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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

In Equity No. [redacted]101

The Coca-Cola Company,
Petitioner,

vs.

The Koke Company of America,
The Southern Koke Company, Ltd.,
The Koke Company of Texas,
The Koke Company of Arkansas, and
The Koke Company of Oklahoma,
Respondents.

Brief on Behalf of Respondents.

Volume 1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

In Equity No. 362.

THE COCA-COLA COMPANY,

Petitioner,

vs.

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF ARKANSAS, and
THE KOKE COMPANY OF OKLAHOMA,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

STATEMENT OF THE CASE.

This is a suit for an injunction against alleged trade-mark infringement and unfair competition, and for an accounting of damages and profits.

The case is here on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a decision reversing the judgment of the District Court with instructions to dismiss the bill at complainant's* cost on the ground that the plaintiff's conduct in connection with its beverage, the name, trade-mark, and label

*Throughout the remaining portion of the brief the petitioner is referred to as plaintiff and the respondents as defendants.

thereof, and its representation to the public with respect thereto, constitutes such deceptive, false, fraudulent, and unconscionable conduct as precludes a court of equity from affording it any relief.

Plaintiff is a Delaware corporation engaged in the manufacture and sale of a syrup for making a carbonated beverage, to which it applies the name "Coca-Cola." The defendant, Koke Company of America, is an Arizona corporation and manufactures in St. Louis, Missouri, an extract to be used as a base for making a syrup like plaintiff's syrup, to which it applies the names "Koke" and "Dope." The Southern Koke Company, Limited, and the Koke Company of Texas are also Arizona corporations, the former having its plant at New Orleans, Louisiana, and the latter at Dallas, Texas. The Koke Company of America sells its extract to these defendants, who manufacture it into a syrup like plaintiff's syrup and sell it under the names "Koke" and "Dope" to soda fountains and to bottlers to be made by the latter into a carbonated beverage like that made from plaintiff's syrup. There are no such concerns as the Koke Company of Oklahoma and the Koke Company of Arkansas. Charters were taken out for them under the laws of Arizona, but nothing further was ever done, and their charters were abandoned long before this suit was brought.

(1)—THE PLEADINGS.

a.—THE ORIGINAL BILL.

It was alleged in the original bill that the defendants infringe plaintiff's trade-mark "Coca-Cola" by using the word "Koke" printed in a style of type alleged to deceptively resemble that in which plaintiff prints the words "Coca-Cola"; that defendants unnecessarily make their syrup like plaintiff's in color, and market it in barrels painted a deceptively similar shade of red, and in dispensing bottles deceptively similar to plaintiff's dispensing bottles in size, shape, and color, and that the bottlers to whom the defendants sell their syrup, market the beverage made therefrom in bottles deceptively resembling plaintiff's bottles in size, color, and shape, having thereon labels and crowns supplied by defendants, alleged to deceptively resemble the labels and crowns supplied by plaintiff to the bottlers of its product.

b.—THE ANSWER.

The defendants answered (Rec., 27-87), denying all allegations of the bill of complaint which would entitle the plaintiff to prevail in its action and partiularly averred that the plaintiff comes into court with unclean hands because by using the name "Coca-Cola" and the pictures of coca leaves and cola nuts on its labels, it is deceiving the public as to the composition of its drink, and that plaintiff's product is misbranded and adulterated; that Coca-Cola is not a valid trade-mark; that the registration relied on is invalid, and that such trade-mark had not been infringed by defendants.

c.—AMENDMENTS TO ORIGINAL BILL.

After plaintiff had taken its testimony in chief and

defendants had begun to take their testimony, plaintiff moved to amend its bill to allege that "Koke" and "Dope" are nick-names exclusively applied to Coca-Cola.

The defendants resisted the motion to amend (Rec., 130-138) but the District Court granted it (Rec., 153), the defendants excepting and later assigning the Court's action as error and as an abuse of discretion (Rec., 270).

d.—ANSWER TO AMENDED BILL.

Defendants then answered the amended bill (Rec., 186-210) denying all allegations therein upon which plaintiff would be entitled to prevail and in addition to the averments in the answer to the original bill, particularly averred that the words "Koke" and "Dope" do not designate plaintiff's product exclusively.

(*2*)—THE DECREE.

The District Court decreed that the words "Coca-Cola" are a valid trade-mark, that the words "Koke" and "Dope" are each an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating plaintiff's product; that they were adopted by the defendants for the deliberate purpose of representing their goods to be the product manufactured by plaintiff; that the Koke Company of America, or its predecessors, did not adopt or use the word "Koke" until the year 1909, and that they have no right to its use; that defendants and their predecessors have no interest in or claim to the alleged trade-mark "Coca-Cola", or the "Coca-Cola" business or formula; that their claim of interest in the "Coca-Cola" business and alleged trade-mark and of knowledge of the "Coca-Cola" form-

ula, are without foundation; and that defendants, and each of them, have infringed plaintiff's alleged trade-mark, and have been guilty of unfair competition with plaintiff; and granted the injunction prayed for. (Rec., 242-245.)

Within thirty days of the entry of said decree, the defendants appealed. The assignments of error on appeal appear in the record at pages 250 to 288.

HISTORY OF COMPANION CASES.

The case at bar is only one of a series of suits brought by plaintiff against the defendants and their dealers in various parts of the country, involving substantially the same questions.

On July 23rd, 1913, plaintiff filed a suit against Joseph D. Branham, et al., bottlers and wholesale distributers of defendants' product, in the District Court at Tulsa, Oklahoma, alleging that they were infringing its alleged trade-mark "Coca-Cola", by using the word "Koke"; and that they were passing off a beverage resembling plaintiff's, in response to requests for "Koke" and "Dope", as and for plaintiff's product, in bottles deceptively resembling plaintiff's bottles, and under deceptively similar crowns and labels. After a full hearing on the merits, the District Court dismissed the bill, holding that "Koke" does not infringe "Coca-Cola"; that "Koke" and "Dope" are not used by the public to specifically designate plaintiff's product; that neither the color of plaintiff's syrup, nor the general features of its bottles is, or are, distinctive; that defendants' crowns and labels do not deceptively resemble those of plaintiff; that defendants' product had not in fact been passed off for plaintiff's; and that the defendants had not advised

or encouraged their retail dealers in any way to sell their product as plaintiff's product. *(Coca-Cola Co. v. Branham, et al.,* 216 Fed., 264; *Defendants' Exhibit 272.)* Plaintiff appealed the case to the Circuit Court of Appeals for the 8th Circuit, at St. Paul, Minnesota, but, the day before the hearing, dismissed its appeal and paid all the costs. *(Defendants' Exhibit 273).*

On April 9th, 1914, plaintiff brought suit in the District Court at Dallas, Texas, against the Koke Company of Texas, *et al.,* and in the District Court at New Orleans, against the Southern Koke Company, Limited, *et al.,* and in the District Court at St. Louis, against the Koke Company of America, *et al.* The cases at Dallas and at St. Louis have not been tried. The case in New Orleans was tried in February, 1917, but Judge Foster, who tried it, stated that, inasmuch as the case was between the same parties as those in the present case, and involved identically the same issues and was tried upon identically the same testimony, he was of the opinion that it fell within the principles of comity, and accordingly entered substantially the same decree as Judge Sawtelle entered in the case at bar, with the understanding that it is to remain interlocutory, and to be modified later so as to conform to the decree which is finally entered herein.

In 1913, the Koke Company of America applied to the Patent office for a re-registration of the word "Koke". The Coca-Cola Company opposed the re-registration on the ground that the word "Koke" is an infringement of its alleged trade-mark "Coca-Cola", but subsequently amended its pleadings so as to allege that "Koke" was the nick-name of its product. After various preliminary hearings before the tribunals of the Patent Office, the Examiner of Interferences held:

(a) That confusion because of any resemblance which the mark "Koke" bears to the mark Coca-Cola is unlikely.

(b) That "Koke" is used to a material extent by persons desiring to purchase Coca-Cola, but that *"Koke" is frequently used as a generic term or name for a large class of drinks.*

(c) That *"Mayfield and his business associates did make some use of the word "Koke" as a name for a soda fountain drink during the period from 1888 to 1903,* but abandoned his trade-mark rights thereto in the following period from 1903 to 1909.

(d) That in 1909, it was too late for the Koke Company to acquire trade-mark rights to Koke, and

(e) That the Koke Company's own contention that "Koke" was in common use in many localities as a generic name for any one of a large number of cola beverages in 1909, clearly barred its right to register the word Koke as its trade-mark. (Exhibit E—Appendix to Petition for Certiorari, pp. 61-77.)

Upon appeal, the Koke Company was held not to be entitled to register "Koke" as a trade-mark, the Commissioner of Patents stating—

> "In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trade-mark, the popular pseudonym for the goods which he sells. The answer must be in the negative." (Exhibit F—Appendix to Petition for Certiorari, p. 81.)

From this decision, the Koke Company of America served notice of an appeal to the Court of Appeals for the District of Columbia, but failed to perfect the appeal and allowed it to be dismissed.

BRIEF AND ARGUMENT.

PLAINTIFF'S UNCLEAN HANDS.

From pages 25-33 of plaintiff's brief filed with the petition for certiorari, it appears that the correctness of the findings of fact upon which the Circuit Court of Appeals based its ruling as to plaintiff's unclean hands is admitted, except in a single respect, plaintiff contending that there is no proof that it was under the representation of the name "Coca-Cola Syrup & Extract", "Coca-Cola Syrup", and "Coca-Cola", the pictures of coca leaves and cola nuts on its labels and the advertisement of the preparation as a cure for headache, a valuable nerve tonic, etc., that "a tremendous consumption was built up and under which large numbers of appellee's consumers still consume the mixture." (p. 41.)

An examination of the record will disclose that all the findings of fact made by the lower court, both such as are admitted and such as are disputed in plaintiff's brief, are amply supported by evidence herein which was neither objected to nor open to objection.

Separately stating each finding, we call attention to the proof supporting it in the record, as follows:

The Court found that—

> (1) "In the beginning and for many years thereafter, the coca of which its compound was in large part made, contained the deadly drug cocaine."

DR. JOSEPH JACOBS, who was for three years associated with Asa G. Candler in the manufacture and sale of Coca-Cola:

"I was a member of that firm a very short time. * * * Yes, I am a chemist. 'Coca-Cola' was made by one of the soda water men, not under my supervision, but I knew of the formula and what entered into it. Yes, sir, I knew the formula and what entered into it. * * * Well, it was made from coca leaves then. * * * At that time *'Coca-Cola'* had in it only such cocaine as would be contained in the coca leaves.* Besides concaine, coca leaves have in them extractive matter—*cocaine is the only thing of any importance.* At that time *'Coca-Cola' had just such cocaine in it as came from the coca leaves.* I don't know whether it has since been changed, or no,—it wasn't changed during my connection with it. My connection with 'Coca-Cola' ceased, unfortunately, with the transfer of that paper" (the assignment from Walker, Candler & Co., per Joseph Jacobs, to Asa G. Candler, dated April 22nd, 1891, Plaintiff's Exhibit 76). (Rec., 409-10.)

Other testimony to the same effect:

F. M. ROBINSON, (Rec., 356-365).
ASA G. CANDLER, (Rec., 381).
W. E. VENABLE, (Rec., 393).
G. S. LOWNDES, (Rec., 515).
A. O. MURPHY, (Rec., 1285).

Plaintiff's Exhibit 79 identified by George S. Lowndes (Rec., 515), is an itemized invoice of the materials used in making Coca-Cola syrup by Dr. Pemberton as sold and delivered to Lowndes & Venable and includes "40 lbs. Fld. Ext. Coca Leaves."

Fluid extract of coca leaves, according to the National Standard Dispensatory and the Pharmacopoeia of the United States, contains 5 gms. of the ether soluble alka-

*The italics used in quoted matter throughout the brief are ours.

loids of coca to each 100 cubic centimeters or .5 per cent. of cocaine and its derivatives. See foot note [8], p. 33.

The process which was used in making the coca extract by Dr. Pemberton, Robinson, Venable, Lowndes, and Asa G. Candler, from 1886 to 1892 and by the plaintiff thereafter, would extract the cocaine from the coca leaf (Plaintiff's chief chemist, Dr. H. C. Fuller, Rec., 2356) and the process used was in fact, the same process which is used in making standard fluid extract of coca (Venable, Rec., 393).

The use of this process was continued until 1899 or 1900 (Asa G. Candler, Rec., 418), a period of either 13 or 14 years.

The Court also found that—

> (2) "* * * the caffeine which constituted the other main ingredients was derived mainly and indeed almost exclusively, not from cola nuts but from tea leaves."

W. E. VENABLE, who with G. S. Lowndes bought the Coca-Cola formula from Doctor Pemberton and all the materials used in making it:

> "I bought my coca from Jacobs there,—maybe I got him to order it for me, and the *caffeine*, I got him to order that, also, from *New York*, in *ten pound cans*." (Rec., 393.)

The itemized invoice (Plaintiff's Exhibit 79) of the materials used in making Coca-Cola purchased by Lowndes & Venable from Dr. Pemberton included "everything used in the manufacture" (F. M. Robinson, Rec., 365) and specifically mentions "23 Oz. Merck's Caffeine", *but makes no mention of cola nuts or cola extract.*

At that time, cola nuts or the extract of cola was a very expensive article and very little in use (F. M. Robinson, Rec., 358) and caffeine is made commercially not from cola nuts but from coffee or tea and almost exclusively from the latter.[1]

DR. J. J. KESSLER:

> "Kola nuts are not used in preparing caffeine to my knowledge in this country. I believe the greater amount of caffeine which is made in this country is made from tea leaves. * * * It (the tea leaf) runs higher in caffeine." (Rec., 2468-2469.)

Possibly a very small quantity of cola nuts was used then as it may be today as a subterfuge in an attempt to justify the use of "Cola" in the name, but this is extremely doubtful.

The Court also found that—

> (3) "The labels with which the preparation was adorned contained pictures of coca leaves and cola nuts and was widely advertised and sold, first under the name of "Coca-Cola Syrup & Extract", next, as "Coca-Cola Syrup", and finally, as "Coca-Cola", as a "valuable brain tonic", and "Ideal Nerve Tonic and Stimulant", as a cure of "headache, neuralgia, hysteria and melancholy", and "all nervous afflictions", under which representations a tremendous consumption was built up, and under which large numbers of appellee's consumers still consume the mixture."

[1] "The Pharmacopoeias allow its preparation from either coffee or tea, but commercially it is prepared almost exclusively from tea and 'tea dust' or 'sweepings'."—NATIONAL STANDARD DISPENSATORY, (Lea Bros. & Co., Phila., 1905) p. 330.

CHARLES H. CANDLER:

"I herewith file as *Plaintiff's Exhibit 88* the label that we use on the barrels and kegs of 'Coca-Cola'. We are not using *Exhibit 88* now. It was used until last fall, when the net weight law went into effect. Since then we have been using the label filed as *Plaintiff's Exhibit 80*. These labels are placed on the barrels and kegs containing 'Coca-Cola', and sent broadcast all over the country. The border around those labels purports to be a *picture of coca leaves and cola nuts.*" (Rec., 440.)

Other testimony to the same effect:

DAVE S. BAUER, (Rec., 541).
DR. H. C. FULLER, (Rec., 2371).

SAMUEL C. DOBBS:

"At present I am vice president of the Coca-Cola Company, in charge of advertising and sales. The history of advertising of 'Coca-Cola' since 1892 is as follows: In 1892, the Coca-Cola Co. spent for advertising $11,401.78; in 1893 we spent $12,395.12; in 1894, $14,538.14; in 1895, $17,744.22; in 1896, $23,117.58; in 1897, $52,405.18; in 1898, $43,857.62; in 1899, $48,564.83; in 1900, $84,507.97; in 1901, $100,276.01; in 1902, $149,628.79; in 1903, $200,941.40; in 1904, $289,985.12; in 1905, $356,552.07; in 1906, $486,553.47; in 1907, $550,775.12; in 1908, $624,077.70; in 1909, $675,048.59; in 1910, $853,329.13; in 1911, $978,329.30; in 1912, $1,182,257.29; and in 1913, $1,186,210.39.

"In all that advertising I have mentioned, the predominant feature has been the 'Coca-Cola' trademark. * * * *The name 'Coca-Cola' was always the dominant central feature of the copy*, whether newspapers, magazines, bill-boards, posters, or any other way,—painted walls." (Rec., 308.)

See also defendants' Exhibit 271, and plaintiff's exhibits 76, 88 and 89.

PEMBERTON'S LABEL:

COCA-COLA
SYRUP * AND * EXTRACT.

FOR SODA WATER AND OTHER CARBONATED BEVERAGES.

This "INTELLECTUAL BEVERAGE" and TEMPERANCE DRINK contains the valuable *Tonic and Nerve Stimulant properties of the Coca plant* and Cola (or Kola) nuts, and makes not only a delicious, exhilarating, refreshing and invigorating Beverage, (dispensed from the soda water fountain or in other carbonated beverages), but a valuable *Brain Tonic*, and a *cure for all nervous affections—Sick Head-Ache, Neuralgia, Hysteria, Melancholy*, &c.

The peculiar flavor of COCA-COLA delights every palate; it is dispensed from the soda fountain in same manner as any of the fruit syrups.

J. S. PEMBERTON
—Chemist—
Sole Proprietor, Atlanta, Ga.

(Defendant's Exhibit 271.)

The plaintiff, on page 29 of its brief filed with the petition for certiorari, states that, "There is no proof that such a label (Defendants' Exhibit 271) was used after 1892", but even plaintiff's recent advertising circular (Plaintiff's Exhibit 92) advertises Coca-Cola as a *cure for headache* and a *relief for tired, weary nerves* so that it is fair to assume that advertisements of this character were used not only for six years, but continuously from 1886 to date.

ASA G. CANDLER'S LETTERHEAD:

> "Office of Asa G. Candler, sole proprietor of Coca-Cola, delicious, refreshing, exhilarating and invigorating. The new and popular fountain drink, *containing the tonic properties of the wonderful coca plant and the famous cola nut.* On draft at all popular soda fountains at 5c a glass." (Plaintiff's Exhibit 76.)

The charter of the Coca-Cola Company *(Plaintiff's Exhibit 1)*, under which plaintiff is operating today, shows that Asa G. Candler, Judge John S. Candler, F. M. Robinson, and the others who organized the Coca-Cola Company, looked upon Coca-Cola purely as a medicinal article.

> "The petition of Asa G. Candler, F. M. Robinson and John S. Candler, of the State of Georgia, and J. M. Berry, of the State of Virginia, and F. W. Prescott, of the State of Massachusetts, shows: That they, for themselves, associates, and successors, desire to be incorporated for a term of twenty years, with privilege of renewal at the expiration of that time, under the name and style of 'The Coca-Cola Company'. The object of this association is the manufacture and sale of the copyrighted *medicinal article known as 'Coca-Cola'*, and the manufacture and sale of such *other medicinal articles* and beverages as they may desire." *(Plaintiff's Exhibit 1.)*

PLAINTIFF'S RECENT ADVERTISING CIRCULAR, "The Truth About Coca-Cola", pp. 8-9, (Plaintiff's Exhibit 92):

> "* * * You have heard people argue that 'Coca-Cola' must contain morphine, whiskey, or some other injurious drug, because *it relieves headache.* Well, there are more ways of *relieving tired, weary*

nerves than by benumbing them with cocaine, morphine, bromide, whiskey, or coal-tar remedies. Tea, coffee, and 'Coca-Cola' *relieve headache by refreshing the nerves* and not by deadening them."

SAMUEL C. DOBBS:

"The sales of 'Coca-Cola' from 1886 to 1892 are as follows: In 1886, 25 gallons; in 1887, 1,049 gallons; in 1888, 1,933 gallons; in 1889, 2,171 gallons; in 1890, 8,885 gallons; in 1891, 19,831 gallons; since 1892 the records of the Coca-Cola Company have been made mostly under my own direction and often with my own hand, and are as follows: In 1892, 35,360 gallons; in 1893, 48,554 gallons; in 1894, 63,933 gallons; in 1895, 74,479 gallons; in 1896, 116,492 gallons; in 1897, 167,681 gallons; in 1898, 214,008 gallons; in 1899, 281,055 gallons; in 1900, 370,877 gallons; in 1901, 468,411 gallons; in 1902, 677,515 gallons; in 1903, 881,423 gallons; in 1904, 1,133,787 gallons; in 1905, 1,548,888 gallons; in 1906, 2,107,661 gallons; in 1907, 2,558,782 gallons; in 1908, 2,877,732 gallons; in 1909, 3,486,526 gallons; in 1910, 4,190,149 gallons; in 1911, 4,815,677 gallons; in 1912, 5,504,956 gallons; and, in 1913, 6,767,822 gallons. (Rec., 307-308.)

GUY HENDERSON UPCHURCH, a retail druggist for fifteen years, Mobile, Alabama, (plaintiff's witness):

"No, I do not claim ignorance of the fact that for many years it was generally supposed that 'Coca-Cola' had cocaine in it,—*a great deal of the public supposes that now*, so far as that part of it is concerned. * * * I frequently have the argument that it contains such things. * * * I have asked a good many as to what they thought it contained and they argued with me that they thought it contained those things." (Rec., 530-31.)

DAVE S. BAUER, a retail druggist for twenty-five years, Mobile, Alabama, (plaintiff's witness):

> "I have heard people say that 'Coca-Cola' contains cocaine. * * * *I have heard a good many people who have always contended that it had cocaine in it*, or some extract of cocaine. *That was the general impression for years and years.*" (Rec., 539.)

CECIL V. ROGERS, a retail druggist for twenty-four years, Dallas, Texas, (plaintiff's witness):

> "I have had lots of people come into my store, ladies and men, and take a 'Coca-Cola' and claim that it was always relieving fatigue and tired feeling. * * * I don't know whether it was the general impression or not, but I have heard it said that they thought it contained traces of cocaine. If I get the use of cocaine right, it has an exhilarating effect—it does exhilarate your nerves." (Rec., 739.)

Other testimony to the same effect:

G. J. MARTIN, (Rec., 341).
DR. J. D. T. LAWRENCE, (Rec., 472).
GEORGE L. SEIBERT, (Rec., 553-4).
JOHN W. GRAHAM, (Rec., 557).
GEORGE S. MORSE, (Rec., 646-7).
F. L. SKILLEN, (Rec., 796-7).
A. W. STANLEY, (Rec., 1005).
DR. J. G. PYLE, (Rec., 1726).
T. J. HAIZLIP, (Rec., 1961).

The Court also held that—

> (4) "* * * long prior to the bringing of the present suit the drug cocaine was practically eliminated from the drink and the caffeine of which it has since

been mainly composed, still comes mainly, if not entirely from other sources than the cola nut."

On page 33 of the brief filed with its petition for certiorari, the plaintiff stated:

"Long before the act (The Food and Drugs Act of June 30, 1906) was passed and constantly since any cocaine resulting from the use of coca leaves was eliminated. * * *."

Asa G. Candler fixed the date as in 1899 or 1900. (Rec., 418.)

Charles Howard Candler admitted that caffeine is used "in a pure state" as an ingredient of Coca-Cola (Rec., 442), and that a larger quantity of caffeine is used in the manufacture of bottlers' syrup than in the fountain syrup. (Rec., 444.)

Dr. H. C. Fuller testified that in "Merchandise No. 5" —the only ingredient of Coca-Cola claimed to contain any cola extract—he found only one one-hundredth of one per cent. of caffeine (Rec., 2378) and "Merchandise No. 5" forms less than 2 per cent. by volume of Coca-Cola Syrup. (Dr. Charles Caspari, Rec., 911). This caffeine, claimed to be from cola nuts, is not an appreciable amount and forms only 1-700 part of the caffeine in Coca-Cola syrup.

DR. J. J. KESSLER:

"If 27¾ pounds of caffeine were used in making a batch of this kind of syrup, 1250 gallons of this syrup, there would be 700 times as much caffeine added as would be introduced by the caffeine present in the merchandise No. 5, made from the kola nuts; *.027 of a per cent. of caffeine is not an appre-*

ciable quantity of it. This would amount in percentages to 3-10000 of one per cent. of caffeine gotten from the kola nuts as against 21-100 of a per cent of caffeine added, or *one is 700 times larger than the other.* I was simply going to say that you would have to drink 700 glasses to get as much caffeine from a product made entirely from the kola nuts as you would get in one that is made with added caffeine." (Rec., 2471-2.)

OTHER EVIDENCE SHOWING PLAINTIFF'S UNCLEAN HANDS.

The findings of fact by the Circuit Court of Appeals does not exhaust the grounds upon which, according to the evidence in this case, the plaintiff is shown to be guilty of such deceptive conduct with reference to its product as precludes a court of equity from affording it any relief.

The record establishes the following pertinent facts:

1. Coca and cola preparations were well known and widely used by the general public prior to Coca-Cola.

2. The stimulant properties of and the presence of cocaine in, the coca preparations was well known.

3. Coca-Cola syrup was made by substituting sugar syrup for wine in Pemberton's French Wine Coca, a widely sold proprietary stimulant remedy containing both coca and cola.

4. Coca-Cola was originally given its name because of the ingredients coca and cola.

5. The percolate of spent (exhausted) coca leaves

which was substituted for extract of coca in 1899 or 1900, has none of the tonic, nerve stimulating or other properties of coca.

6. In its extremity plaintiff has attempted to prove that the percolate of spent coca leaves has a flavor due to tannin therein, but coca was never a flavoring material in its product and the percolate has neither the taste nor the smell of coca extract and contributes nothing to the flavor of its beverage.

7. In the plaintiff's evidence that the percolate contains a substantial amount of tannin (enough to affect the taste) is to be found gratuitous proof that in its recent advertising circular (Plaintiff's Exhibit 92) plaintiff misrepresents its product to the public since such circular represents such product as being entirely free from tannin and its deleterious properties.

8. The name "Coca-Cola" is calculated to deceive the public into the belief that the product contains a substantial amount of real coca with what Asa G. Candler termed, "its tonic properties" and a substantial amount of real cola, and not merely the drug caffeine.

9. The public has in fact, been deceived and is now being deceived as to the nature and ingredients of plaintiff's product by the name used thereon.

10. The plaintiff has issued an advertising pamphlet admitting that many have inferred *"presumably from the name"*, that Coca-Cola must contain cocaine, but denying its presence in the drink.

11. Plaintiff's product is adulterated within the meaning of Section 7 of the Food and Drugs Act of June 30, 1906.

12. Plaintiff's product is misbranded within the meaning of Section 8 of this Act.

INGREDIENTS OF PLAINTIFF'S PRODUCT LONG WELL KNOWN TO THE PUBLIC.

While the deception of which plaintiff is guilty is plain from its use of the name "Coca-Cola" on a product which, since either 1899 or 1900, has contained no coca and which never contained more than a mere trace of cola, the extent and far reaching effect of this deception will be much clearer if exhibited against the background of the past.

THE DRUGS COCA AND COLA.

The dried leaves of the coca plant are known commercially and scientifically as "coca"[2] *just as the dried leaves* of the tea and tobacco plants are known commercially and scientifically as "tea" and "tobacco".

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[2]**"COCA.**—The dried leaves of a South American shrub **(Erythroxylon coca)** of the flax family **used in medicine as a tonic,** and chewed by the native Indians as a nervine stimulant."—**FUNK & WAGNALLS NEW STANDARD DICTIONARY** (Funk & Wagnalls Company, New York and London, Editions 1913 and 1916), page 511.

"COCA.—A South American shrub (Erythroxylon coca); also its dried leaves, which are used as a a **powerful nerve stimulant and yield cocaine."—WEBSTER'S NEW INTERNATIONAL DICTIONARY,** G. & C. Merriam Co., 1900), page 426.

"COCA.—(1) The dried leaves of **Erythroxylon coca.** *** It is a stimulant bearing some resemblance in its effects to tea and coffee, and has long been used as a masticatory by the Indians of South America. **It relieves** feelings of **fatigue** and hunger, and the difficulty of breathing experienced in climbing high mountains. **The habit of chewing coca is an enslaving one. Coca is used in medicine as a tonic and stimulant; it yields the valuable alkaloid, cocaine. CENTURY DICTIONARY AND CYCLOPEDIA** (The Century Company, New York, 1913), Vol. 2, page 1073.

"COCA.—An infusion, or a tincture in wine, is often prescribed by physicians as a tonic. About 40,000,000 pounds of the leaves are exported annually from South America. **The chief value of coca consists in the alkaloid cocaine. * * * The preparations of coca found in the United States Pharmacopaoeia are: (1) coca, the dried leaves; (2) the fluid extract; (3) cocaine;** (4) hydrochlorate of cocaine; (5) oleate of cocaine."—**NELSON'S ENCYCLOPEDIA,** Perpetual Loose Leaf Edition (Thomas Nelson & Sons, New York), Vol. 3, page 211.

"COCA.—The dried leaves of **Erythroxylon coca** Lamark **(Fam.**

JOHN W. ROSSITER, of Chicago, (plaintiff's witness):

"For a great many years Erythroxylon coca has been bought and sold on the market under the name of Erythroxylon coca, or coca leaves. The United States Pharmacopaeia names this product 'coca', and it is known commercially as 'coca'." (Rec., 935.)

DR. JOHN A. WESENER, of Chicago, (plaintiff's witness):

"I think possibly it is true that coca was bought and sold commercially under the name 'coca' prior to 1886, and that, while they have in some instances used the name 'coca leaves', the word 'coca' was used commercially in designating this product, or drug, or plant." (Rec., 924-925.)

DR. H. C. FULLER, of Washington, D. C., (plaintiff's witness):

"You ask if there are any substances known as 'coca' and 'cola' under their own distinctive names; well, they are well known drugs on the market,—coca leaves and cola nuts." (Rec., 2374.)

Erythroxylaceae), known commercially as Huanuco coca, or of **E. Truxillense** Rusby, known commercially as Truxillo coca, yielding, when assayed by the process given below, **not less than 0.5 per cent. of the ether-soluble alkaloids of coca [cocaine and derivaties].** *** —**The Pharmacopoeia of the United States, 8th Decennial Edition (Official from September 1st, 1905),** p. 106.

"**COCA.**—*** When taken in some quantity they produce an intoxication like that of opium. **As the indulgence is repeated, the appetite increases, while that for all other forms of nourishment diminishes; the miserable victim loses all power of resisting his craving and becomes reduced to a condition of physical and mental prostration.** When used in moderation, **coca lessens the appetite for food** and enables those who have partaken of it to **sustain greater fatigue** than they otherwise could. It has been found the best preventive of asthmatic symptoms caused by rapid ascent of lofty mountains. **An infusion of the leaves is also used with the same effect."—THE AMERICANA** (The Americana Co., New York, 1917), Vol. 5.

Cola *vera* and cola *acuminata* are two varieties of trees that grow in tropical Africa, the West Indies, Brazil, and various other tropical countries, and bear a nut or seed, which, when separated into its cotyledons, dried, and placed on the market, is known commercially and scientifically as "cola"[3] or "kola".

Before 1866 scientists both here and abroad had made exhaustive research into the origin, history, constituents, and physiological effects of both coca and cola, and the results of their investigation had been published broadcast in the standard scientific works of that day.[4]

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[3]"**COLA.—KOLA.**—The recent or dried cotyledons of **cola vera,** or of **cola acuminate.** *** ORIGIN.—From good sized and handsome trees, natives of tropical Africa, and rather extensively cultivated in some other tropical countries, the second especially in the West Indies where it is quite extensively naturalized. The commercial supplies come from Africa and the West Indies. The West Indian are larger and better looking, but, according to Dohme's analysis, contain less caffeine. *** For drying, their cotyledons are separated and exposed to the sun. When thoroughly dried they can be easily and perfectly kept for any desired time. *** Kola is used by the natives as a muscular stimulant or supporter very much as coca is used in the Andes, and there is a very large domestic trade in it in Africa. The literature of its native use is now quite extensive. *** The dried kernels are usually separated into their cotyledons, which are halves or quarters of the above described bodies (seeds). *** They are heavy, hard and tough, the fractured surface light brown and minutely granular. **There is no odor, and they have merely a slight astringent taste.** Kola seeds contain. *** 1.5 to 3.6 per cent. total alkaloids. From 1-100 to 1-40 of this alkaloid is theobromine ($C^7H^8N^{4}O^2$) and the rest is caffeine ($C^8H^{10}N^4O^2$)."—**NATIONAL STANDARD DISPENSATORY** (Lea Bros. & Co., Philadelphia, 1905).

"**COLA-NUT,** or **Kola-nut.**—The seed,—not properly the nut,—of **cola acuminata,** a large tree of the natural of Sterculiaceae, native of Western Tropical Africa, cultivated in the West Indies, Brazil and other tropical countries where it has to some extent become naturalized. *** In the tropics, especially in the Sudan, where they are known as guru-nuts, **they are employed as a stimulant,** and as a remedy for tropical diarrhoea. **The nuts contain from 0.7 per cent. to 0.2 per cent. of the alkaloid caffeine, and a small amount of tannin and theobromine.** According to Keubel and to Hilger, **fresh cola nuts probably contain no caffeine at all, but a glucoside the fermentative decomposition of which yields caffeine, glucose and cola red."—THE NEW INTERNATIONAL ENCYCLOPAEDIA** (Dodd, Mead & Co., New York, 1913), Vol. 5, page 129.

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[4]**THE UNITED STATES DISPENSATORY** (WOOD & BACHE) 12th Edition, **published by J. P. Lippincott & Co., at Philadelphia, in 1866** (pp. 1513, et seq.):

"Erythroxylon coca (Lamark).—Coca.—It is a shrub growing wild in South America, and largely cultivated in Bolivia for the sake of its leaves, which are much used in that country as a masticatory.

By 880, both coca and cola had become so well known as artiles of commerce that they had found a place in dictionaries of commerce and manufacture.[5]

The plantis propagated from seeds in nurseries, which begin to yield in eightee months and continue productive for half a century. The leaves, onbeing picked, are dried in the sun, and then packed in bags. **The are known in South America by the name of coca.** This was in geeral use among the natives of Peru at the time of the Conquest, ad has continued to be much employed until the present time. *** Sme attempts were made to analyze coca before the publication of te 11th. Edition of this Dispensatory, of which the main results were that the leaves contained a peculiar bitter principle, resin, tannic an aromatic principle, extractive, chlorophyll, a substance analogus to theine, and salts of lime. **(Journal de Pharm., April, 1859, p283.)** Dr. Albert Niemann, of Gaslor, has made a most thorough invstigation of the leaves and succeeded in isolating a peculiar alkaid to which he gave the name of cocaina. *** He also obtained wax, variety of tannic acid (cocatannic acid) and a concrete volatile corous substance. (See **Am. Journ. of Pharm., March, 1861, p. 122.)** Dr. Maisch, of Philadelphia, succeeded in obtaining from the leave an uncrystallizable alkaloid having so nearly the properties of caina that he considered it merely as the result of the action of h on the crystallizable principles. **(Ibid, November, 1861, p. 500.)** Sll more recently M. Lasseu has examined cocaina and ascertained at it splits into benzoic acid and a new base which he calls ecgonine*** **(Journ. de Pharm., Juin, 1862, p. 522.)** According to Dr. Weddcoca produces a gentle excitation with an indisposition to sleep, i these respects resembling tea and coffee. It is asserted to suppc the strength for a considerable time in the absence of food, bit does not supply the place of nutriment, and, probably, in this spect also, acts like the two substances referred to. The Indians, ile chewing it, pass whole days in traveling or working without f ; but they nevertheless eat freely in the evening. Weddell statehat persons unused to it are liable to unpleasant effects from its use; he has known instances of hallucinations apparently resulting om this cause. The natives chew it with some alkaline substance, the ashes of certain plants, or lye. (Weddell, **Voyage dans le Nord e la Bolivia.)** In large quantities, it is said to produce a general exation of the circulatory and nervous systems, imparting increased or to the muscles as well as to the intellect, with an indescribable eling of satisfaction amounting almost sometimes to a species of lirium. *** **(Montegazza, N. Am. Med.-Chir. Rev., March, 1860, p. .)** A medium dose is from 3 to 4 drachms, taken in infusion. For results of erperiments on the physiological effects of coca by **M. L**, (See **Ann. de Therap., 1864, p. 118.)"** **Ibid,** p. 1605—

"STERCULTA ACUMATA.—This is a large African tree, known as the source of the **k nuts** of Guinea. As this page was going to press, we saw an announcement in the **Pharmaceutical Journal (Feb., 1865, p. 407)** that Daniell has discovered in these nuts a crystallized alkaloid which e believes to be **theine,** or, as it is now generally called, **caffeine.** e was induced to make the examination by noticing that after ta a decoction of the seeds he was effected with long continue ss of sleep."

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[5] **DICTIONARY OF COMERCE & MANUFACTURE** (Estes & Laurote), Boston, **1880,** p. 1

"COCA.—The leaves of t Erythroxylon coca, a plant which is grown largely in Peru and via. The Bolivian coca is said to be

The chief value of coca is due to its predominant alkaloid, cocaine, and similarly, the chief value of cola is due to its predominant alkaloid, caffeine.

DR. JOHN A. WESENER, of Chicago, (plaintiff's witness):

> "The *characteristic property of coca*, or of the coca leaf, is due to its predominant alkaloid, cocaine. The *characteristic property* of coca, or cola nut, is caffeine and theobromine." (Rec., 328.)

DR. C. A. MESERVE, of Tucson, Arizona, (defendants' witness):

> "The most important characteristic of the coca plant, apart from the ordinary constituents that you find in any plant life, is cocaine. That is the alkaloid." (Rec., 2464.)

ASA G. CANDLER, president of the Coca-Cola Co.:

> "*(Mr. Hirsch*: Mr. Candler, you can answer that question that he asked you a while ago,—go ahead and tell him what is the leading alkaloid contained in the coca leaf.) A. Cocaine, that is the leading alkaloid." (Rec., 384).

superior to the Peruvian. The best kind is said to come from the Province of Yurgas, and the most inferior product from Peru. The consumption of coca in Peru and Bolivia is enormous. In small doses it is supposed to act as a stimulant and aid digestion; in larger ones it is said to possess dangerous narcotic properties. The mountaineers of South America state that they are enabled to reach high elevations without difficulty in respiration and to stave off the feeling of hunger by chewing the leaves during their ascent. Good quality coca should have its leaves unbroken, a medium size, bright green color, and of an odor somewhat resembling that of hay and chocolate. The taste is bitter."

Ibid, Vol. 3, p. 643:

"KOLA-NUTS.—Colas.—The brown seeds of Sterculia acuminata, about the size of a pigeon's egg, which are very highly esteemed in Africa."

DR. JOSEPH JACOBS, of Atlanta, (plaintiff's witness):

> "Besides cocaine, coca leaves have in them extractive matter,—*cocaine is the only thing of any importance.*" (Rec., 410.)

DR. J. J. KESSLER, of St. Louis, (defendants' witness):

> "Cola nuts contain about 1½ per cent. caffeine." (Rec., 2468).

PREPARATIONS OF COCA AND COLA THAT PRECEDED PLAINTIFF'S "COCA-COLA".

For a number of years, prior to 1886, various concerns throughout the country manufactured and marketed in considerable quantities, certain varieties of so-called "tonics", which were advertised extensively as "brain tonics", "nerve stimulants", and cure-alls "for all manner of nervous affections", from headache, neuralgia and hysteria, to melancholy. Some of these were composed of the fluid extract of coca, others of the fluid extract of the cola, and still others of a mixture of the two. Their chief claim to merit was due to their exhilarating effect. This effect was produced by cocaine, the active principles of coca, or by caffeine, the active principle of cola, or by the combined potency of both drugs. These tonics were known and widely advertised by names descriptive of their leading ingredients, such as "Wine of Coca", "Coca-Wine", "Coca-Malta", "Cola Cordial", "Kolafra", etc., and generally contained a statement on the label of the active medicinal agents, together with pictorial representations of the plants, shrubs, trees, or nuts from which those drugs were de-

rived. The nature and effect of such preparations has long been well known.[6]

Among these highly stimulating "tonics" was one known as, "Pemberton's French Wine Coca", manufactured by a Dr. John S. Pemberton, an old chemist of Atlanta, Georgia, who was himself a cocaine fiend. (Rec., 1283). The label which he used on his bottles, and which he registered in the Patent Office May 19th, 1885, is in evidence as *Defendants Exhibit 23*. This label tells what the article was. A photograph of the original label is shown on the opposite page.

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[6]"**Taken in moderate amount coca, or cocaine, produces a sense of exhilaration.** *** Because of the pleasant effects which cocaine produces when taken hypodermically or by the mouth, the cocaine habit is not rarely met with, many persons becoming slaves to the use of this drug. *** The nervous breakdown of the patient under the continued use of this remedy is even more rapid than when morphine is abused.—**Pharmaceutical preparations:** Aromatic Wine of Coca, N. F.; Elixir of Coca, N. F.; Elixir of Coca and Guarana, N. F.; Fluid Extract of Coca, U. S. P.; **Wine of Coca,** N. F."—NATIONAL STANDARD DISPENSATORY (Lea Bros. & Co., Philadelphia, 1905) pp. 448-449.

"Administered by the mouth, **cocaine is a nerve stimulant** exciting respiration and circulation, **removing the sense of fatigue, stimulating to muscular and mental effort,** and deadening to the sense of hunger, although not affording any nutriment. The dangers of cocaine differ according to the different methods of administration. **The stimulating effect which it produces on the brain tends to the formation of the cocaine habit,**—as serious an addiction as morphinism or alcoholism. Among the natives of the region where the coca shrub is grown, it is said that once the habit of chewing the leaves is formed, it is never abandoned, and the nervous system is ruined thereby. It should be more widely known that **cocaine is the active principle in 'Coca Wines',** the drinking of which is said to have led to the formation of **the cocaine habit."**—NELSON'S ENCYCLOPAEDIA, Perpetual Loose Leaf Edition (Thos. Nelson & Sons, New York), Vol. 3, p. 211. Title, "Cocaine."

"The cocaine habit is of more recent growth than that of morphine and it claims an increasing number of victims. Erlenmeyer has recently called it the third scourge of humanity. As an enslaving drug it is the most insidious, the most rapid in its conquest, the most demoralizing in its effects, and the most permanent in the marks it leaves on the patient should he long survive its use. **A common method of acquiring the habit** is by means of **medicated drinks and sweets, such as wines, coca,** voice lozenges and the use of the nasal spray."—NELSON'S ENCYCLOPAEDIA, Perpetual Loose Leaf Edition, Vol. 4, p. 141. Title, "Drug Habits."

"The principle constituents of coca are cocaine and several derivaties. *** **The common forms of administering** are in the **Wine of Coca,** the **fluid extract,** and the alkaloid **cocaine.** *** When used habitually and in excess, it weakens the digestion, and produces bi-

FRENCH

COCA · WINE!

The Marvelous Invigorator!

The Great Nerve Tonic!!

The Queen of Stimulants!!!

The Intellectual Beverage!!!!

COCA WINE exhilarates, invigorates, sustains and refreshes both body and brain!

THE RESTORER PAR EXCELLENCE!

Exhilarating and Stimulating all the Vital Functions without Reaction!!

The reconstructive, invigorating and health-restoring properties of the COCA WINE are truly wonderful, and excel all other Tonics and stimulants.

☞ *Recommended for those recovering from the Opium and Morphine habits; also for all who are compelled to use a stimulant.*

PRICE $1.00.

None genuine without signature of

J. S. PEMBERTON.

French

WINE COCA

IDEAL NERVE TONIC

AND

STIMULANT.

J. S. Pemberton

COCA WINE

IS A SCIENTIFIC COMBINATION

—OF THE—

Concentrated Extractive of Erythroxylon Coca, Damiana and Kola Nuts, with an excellent quality of Bordeaux Wine,

Especially Recommended for all Diseases where a Pure Nerve Tonic and Stimulant is Indicated,

such as Mental and Physical Exhaustion, Nervousness, Hysteria, Melancholy, Neuralgia, Sick-Headache, Indigestion, Gastric Irritability, Diabetis, Gravel, Prostatic, Constipation, Heart Diseases, etc. Wine Coca strengthens and tones the Sexual Organs to all the vigor of youth, cures Sterility, Impotency, Spermatorrhœa and impaired vitality of the genital organs. (Indispensable after Alcoholic excesses.) This agreeable and most efficacious of all Tonics and Stimulants, increases the secretion of gastric juices, gives appetite, sound digestion and refreshing sleep, makes every muscle stronger, the mind clear and strong, the entire body invigorated and refreshed.

DIRECTIONS.

ONE-HALF WINE GLASS FULL, half hour before each meal or immediately after meals.

Delicate persons or children, TWO TABLESPOONFULS.

WINE COCA taken upon rising in the morning will relieve all sensations of bad feeling in the Stomach, and remove the Tobacconist to which so many persons are subject, and make you strong and bright for to learn work.

J. S. PEMBERTON & CO., Sole Prop'rs,

ATLANTA, GA.

liary and other disorders, and finally induces a miserable ruin of body and mind."—THE NEW INTERNATIONAL ENCYCLOPAEDIA (Dodd, Meade & Co., New York, 1913), Vol. 5, p. 92. Title, "Coca."

"When taken internally, **cocaine is a mental stimulant,** and **moderate doses usually cause a pleasant sense of exhilaration and a temporary increase in mental and physical power.** *** The sense of hunger and fatigue is lessened so that privations for the time being may be better endured under the influence of the drug."—THE AMERICANA (The Americana Co., New York), Vol. 5. Title, "Cocaine."

"In man, smaller quantities of **caffeine** stimulate the central nervous system, in particular that part associated with the physical functions. **The ideas become clearer, thought flows more easily and rapidly, and fatigue and drowsiness disappear.** Not infrequently, however, connected thought is rendered more difficult, for impressions follow each other so rapidly that the attention is distracted, and it requires more and more effort to limit it to a single object. *** The stimulation of the higher nervous centers is often evidenced by the insomnia and restlessness which in many people follow the indulgence in coffee and tea late at night. *** The action of caffeine on the central nervous system has led to its employment in a number of different conditions. Thus, in nervous exhaustion it may be used to stimulate the brain, and in collapse its action on the vasomotor and respiratory centers has been found of value. *** In narcotic poisoning, with failing respiration, caffeine may be used to stimulate the center in place of strychinine or atropine; in opium poisoning more particularly, strong coffee has been used, but caffeine may be substituted to advantage. Its stimulating action on the brain, and more especially on respiration, renders it an antidote in dangerous cases of alcoholic poisoning, also. **Some forms of migraine and headache are relieved by caffeine,** but in some it seems rather to intensify the pain; this action has been attributed to its dilating the cerebral vessels. Cola preparations are often advised as general tonics in weakness and neurasthenia."—PHARMACOLOGY AND THERAPEUTICS, OR THE ACTION OF DRUGS (Lea Bros. & Co., Philadelphia, 1906) Title, "Caffeine."

"**Caffeine** has absolutely no nutritive value. If taken in moderate doses, it has the effect of increasing the blood pressure, and stimulating the cerebrum, thus **increasing the reasoning power and the imagination;** it is even believed to increase the powers of muscular endurance. Large quantities, however, are liable to cause trembling of the muscles, and toxic doses have the effect of paralyzing the heart. *** Therapeutically, caffeine is used to combat certain forms of nervous and cardiac depression, certain headaches and neuralgias, gout, the insomnia of alcoholism, and opium narcosis."—THE NEW INTERNATIONAL ENCYCLOPAEDIA (Dodd, Meade & Co., New York, 1913), Vol. 3, p. 788.

In the statement made in connection with his application for the registration of this label, Dr. Pemberton said:

> "My trade-mark consists, especially, of the representation of the coca plant, having printed across it the words 'French Wine Coca, *The Ideal Nerve Tonic, Health Restorer and Stimulant*', accompanied by the fac-simile signature of J. S. Pemberton. This trade-mark I have used continually in my business since April, 1882. The class of merchandise to which the same is appropriated is a medicinal preparation, and a particular description of goods comprised in said class is a nerve tonic, known as 'French Wine of Coca', and it is my practice to apply my trade-mark to bottles containing the said medicinal preparation by means of suitable labels on which the representation of the coca plant and the words mentioned, are printed in colors with the fac-simile signature of J. S. Pemberton affixed at the bottom of said label." (Defendants' exhibit 23.)

Defendants' Exhibit 21 is a photograph of the stationery used by the Pemberton Medicine Company in 1888 in connection with the manufacture and sale of "Pemberton's French Wine of Coca", a reproduction of which is shown on the opposite page.

A. O. MURPHY, of Barnesville Georgia, one of the partners composing the Pemberton Medicine Co.:

> "Defendants' exhibit 21,—this whole batch of several pages,—is the letter written by me. That is the stationery that we had at that time,—the date of the letter is March 8th, 1888. That picture on the left of the letter head there is a picture of a coca plant. The old Doctor (Pemberton) had a cut of it, you know, and we incorporated it in all of our stationery, on our letter heads, and I think it is on

J. S. PEMBERTON. A. O. MURPHEY. E. H. BLOODWORTH. J. C. MAYFIELD.

PEMBERTON'S
FRENCH WINE COCA.

ERYTHROXYLON COCA PLANT.

OFFICE OF

PEMBERTON MEDICINE CO.

SOLE PROPRIETORS OF

PEMBERTON'S FRENCH WINE OF COCA,
GLOBE FLOWER COUGH SYRUP,
Gingerine Liver Pills, Lemon Juice Cordial, Indian Queen Hair Dye, &c.

67 SOUTH PRYOR STREET.

Atlanta, Ga., Mch 8 188 6

Commissioner of Patents
Washington D.C.
Dear Sir,
Please find enclosed
money order for $6.00 to pay for the
Pemberton registration
Yours truly
Pemberton Medicine Co
By A. O. Murphey

the labels that we pasted on the Wine of Coca. * * * We tried to carry that through it, you know. That picture there is the picture of the coca plant. *At that time there seemed to be quite an interest in the extract of coca leaves and cola nuts, as a nerve tonic*, is my recollection; and, soon after we got over on Pryor and Hunter Streets, we found out that *Thurber Wyler & Co., of New York, were putting up a Wine of Coca* that they were calling '*French Wine of Coca*'. We got into correspondence with them. It seemed that *it was up there in New York City, too,—the effect of the extract of coca leaves upon the nervous system*,—and we at once thought of stopping them in that, and we did carry on considerable correspondence, to the extent of getting the legal opinion of Hon. J. J. Hammond, who was a personal friend of mine, and also my father-in-law. I went to him as an advisor and told him I would rather pay him to tell me whether I was doing right or no, than to get into a law suit, and I paid him $40.00 for him to tell me not to get into the suit. We attempted to have them stop, but we abandoned it. I only mention that to show that *coca extract was at that time considered a nerve tonic all around. We advertised that feature of it*, as strengthening the strength of the nervous system. *The public at that time knew about the coca.* * * * This (defendants' exhibit 23) is the label we used on the wine tonic, 'Wine of Coca'. *We put the extract into the wine in place of putting it into a syrup*, and this went into quart bottles. This is the label on the bottle. I knew what coca was after I got into the business. *The general public heard of it through these preparations, of course.*" (Rec., 1285-1288.)

F. M. ROBINSON, a stockholder and director of the Coca-Cola Co., and for 23 years its secretary, but who was formerly associated with Dr. Pemberton in the manufacture of "Pemberton's French Wine Coca":

"Yes, sir, I helped him (Dr. Pemberton) make 'Pemberton's French Wine Coca'. Yes, sir, he used coca and cola nuts in the preparation of that, and a wine. Well, the sales of 'French Wine Coca' were fairly extensive; we thought it was pretty good when we went into it. That was his leading article at that time." (Rec., 356-357.) * * * Yes, *coca leaves and cola nuts were used in the manufacture of 'Wine of Coca'.*" (Rec., 365.)

SAMUEL C. DOBBS, now vice-president and sales-manager of the Coca-Cola Co., but then a clerk in the employ of A. G. Candler & Co.:

"Dr. Pemberton sold 'Pemberton's French Wine of Coca' *a long time before 'Coca-Cola.'* A. G. Candler used to buy that *in large quantities.* That was put up in bottles,—what we call 'sixes',—six to a gallon. I do not remember when the trade on that played out. My recollection is that along in 1887 there was very little, if any, demand for it. We had some in stock, but I don't know whether there was any demand for it or not; but he manufactured it previous to 1886 and 1887,—'Pemberton's French Wine Coca'. Candler & Co. bought *a great deal of it, and sold it,* but it was not dispensed; it was sold in these bottles as a medicine. * * * It was some kind of nerve tonic." (Rec., 328.)

Wine of Coca was manufactured extensively by many concerns throughout the country, and, in fact is an official preparation listed in the Pharmacopaeia and in the Dispensatory.[7]

[7] **"VINUM COCAE.—Wine of Coca.**—Fluidextract of Coca, 65 Cc.; Alcohol, 75 Cc.; Sugar, 65 Gm.; Red Wine, a sufficient quantity to make 1,000 Cc. Dissolve the Sugar in 500 Cc. of Red Wine, add the Alcohol and Fluidextract of Coca, and enough Red Wine to make the liquid measure 1,000 Cc. Set the mixture aside for two days; then filter through paper, in well-covered funnel. Average dose,—16Cc. (14 fluiddrachms)."—PHARMACOPAEIA OF THE UNITED STATES (8th Decennial Edition) p. 501.

C. G. PETERS, of New Orleans, 31 years in the retail drug business, (plaintiff's witness):

"Yes, sir, I remember the thing that used to be called 'Wine of Coca'; that's an official preparation, —standard in the Pharmacopaeia. I have known 'Wine of Coca' ever since I have been in the business. You ask if I remember who used to put it up; I make it, everybody makes it. It is just open to the whole world. *Its color is dark, like Coca-Cola, sarsaparilla and root beer.* I haven't made it for a number of years,—it has died out, no use for it. *These other things (cola drinks) have taken its place.* It used to be made out of coca leaves and Sherry wine. In those old days we gentlemen of the trade used to buy the coca leaves and the Sherry wine and make it ourselves, or we made it out of the fluid-extract of coca. * * * Yes, sir, the coca leaf has in it the element of cocaine. *When I sold 'Wine of Coca' there was cocaine in it, yes, sir. The fluid-extract of coca was a commercial article generally sold at the time I am speaking about, and the 'Wine of Coca' was sold extensively also, but 'Wine of Coca' has not been used for the last eight or nine years.* However, *it was the predecessor of these things* (cola drinks), *and had the same general look and taste.* There was no secret in the trade,— *those who used 'Wine of Coca' knew what is was made of, certainly.* It was generally understood by the physicians that there was not enough *cocaine* in it to do any harm. It was simply a *stimulant.*" (Rec., 655-656.)

"**VINUM COCAE.—Wine of Coca.—Preparation.**—Fluidextract of Coca, 65 Cc.; alcohol, 75 Cc.; sugar, 65 Gm.; Red Wine, a sufficient quantity to make 1,000 Cc. (The rest of the process given, same as in United States Pharmacopaeia.) *** Each Cc. of Wine of Coca represents 0.065 Cc., or 1 fluiddrachm about 4 minims, of Fluidextract of Coca. **USES.**—This preparation combines the stimulant effects of coca with those of the menstruum. **It has become very popular with the laity as a remedy in mental and physical fatigue. It may be administered whenever the effects of the drug are desired.** The doses are from 2 to 8 drachms (9-30 Cc.)"—THE NATIONAL STANDARD DISPENSATORY (Lea Bros. & Co., Philadelphia and New York, 1905) pp. 1637-1638.

DR. JOHN A. WESENER, of Chicago, (plaintiff's witness):

> "Yes, sir, I am familiar with 'Wine Coca'. Yes, sir, I think I have seen the labels that were used on the old bottles of 'Wine Coca' *showing pictures of coca leaves and cola nuts thereon.* * * * It is true that Park-Davis & Co., of Detroit, manufactured for a great many years, a preparation of this character, and *sold it extensively throughout the United States;* but they sold that as a medicinal preparation. * * * I am not familiar with the fact that Dr. Pemberton made a product called 'Pemberton's French Wine'." (Rec., 925-926.)

JOHN W. ROSSITER, of Chicago, (plaintiff's witness):

> "There was one remedy, a patent medicine, that was sold quite extensively here for a while that was known, I think, as 'Wine of Coca'. It had quite a sale here for a while. That, to my knowledge, was about the only preparation of coca that was sold very extensively. It was sold as a proprietary remedy." (Rec., 936.)

SAMUEL C. DOBBS, vice-president and sales-manager of the Coca-Cola Co.:

> "Among other coca wines and coca cordials that were made at that time by various parties, was 'Vin-Mariani', and 'Kolafra'. 'Mariani' was made up east somewhere, and 'Vin-Kolafra' was made by Johnson & Johnson. There was 'Vin-Mariani',—oh, three or four of those preparations that I do not recall right now, all put up in bottles. *I presume they were made out of coca; they carried that inference by the name on them.* Along about that time, or just previous thereto, there was quite a little business on that class of product,—they had a

sort of run on it along in those years." (Rec., 328-329.)

DR. WILLIAM M. SIMONSON, of Cincinnati:

"A considerable number of preparations of coca leaf came into use about that time, 1886, chiefly on account of the agitation due to the introduction of the prepared alkaloid into medical and surgical practice. The cocaine was much talked of in pharmaceutical and medical practice about 1884 and 1886, and these various wines, and the like, were put on the market about that period. From my experience, which was obtained from my connection with the drug business, *they were sold largely outside of physicians' orders. They were more or less known popularly, and I know for myself that I have sold them often without any orders from any physician whatsoever,* much like any ordinary merchandise package would be sold at any pharmacy." (Rec., 2510.)

The fluid extract of coca,[8] of which these wines were chiefly composed, was a well known commercial article at that time, and many druggists throughout the country made it themselves from the coca leaves. It was one of the official preparations of coca.

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[8] **"FLUIDEXTRACTUM COCAE.—U. S.—Fluidextract of coca.—Preparation.**—Coca, in No. 40 powder, 1000 Gm.; diluted alcohol, a sufficient quantity to make 1000 Cc. Moisten the powder with 450 Cc. of diluted alcohol and pack it firmly in a cylindrical percolator; then add sufficient diluted alcohol to saturate the powder and leave a stratum above it. When the liquid begins to drop from the percolator, close the lower orifice, and, having closely covered the percolator, mascerate for 48 hours. Then allow the percolation to proceed, gradually adding diluted alcohol, until the coca is exhausted. Reserve the first 800 Cc. of the percolate and evaporate the remainder at a temperature not exceeding 50° C. (122° F.) to a soft extract; dissolve this in the reserved portion, and mix thoroughly. *** Assay 10 cubic centimeters of this liquid by the process given below; from the results thus obtained, ascertain by calculation the amount of ether soluble alkaloids in the remainder of the liquid, and add to this enough diluted alcohol to make each 100 cubic centimeters contain 0.5 Gm. of the ether soluble alkaloids of coca" [that is, of cocaine and its derivatives.]—**NATIONAL STANDARD DISPENSATORY** (Lea Bros. & Co., Philadelphia) p. 658; **THE PHARMACOPOEIA OF THE UNITED STATES,** 8th Decennial Edition, p. 175.

C. G. PETERS:

"The fluid extract of coca was a commercial article generally sold at the time I am speaking about." (Rec., 656.)

WILLIS E. VENABLE, (plaintiff's witness):

"I took the coca leaves and made my fluid extract of coca myself by percolation,—made many a gallon *besides what I made for the 'Coca-Cola'*, before that and since. They used that in the drug business and I have been in the drug business * * * all my life." (Rec., 393.)

DR. JOHN A. WESENER:

"Parke-Davis & Co. make up one product which is known as fluid extract of coca, and another product known as fluid extract of cola. * * * They are medicinal products." (Rec., 931.)

Prior to 1885, Benjamin Kent, a retail druggist of Paterson, New Jersey, who had carried a line of coca wines for a number of years, devised a "tonic" containing fluid extract of coca, which he recommended to his trade and dosed out to them from a bottle on his shelf. In 1885, in looking over the catalogue for the years 1883 and -4 of Frederick Stearns Company, of Detroit, his attention was attracted to two parallel articles, one commenting upon the drug coca, and the other upon the drug cola. The idea immediately struck him that it would be appropriate to call it "Coca-Cola". So he adopted "Coca-Cola" as the name of his preparation and thereafter labeled his bottles with that name.

BENJAMIN KENT, of Paterson, New Jersey:

"I offer in evidence this book,—this catalogue,—

of Frederick Stearns Company, of Detroit, Mich. The catalog is No. 84, dated 1883 and -4, and on page 38 there are parallel articles on Coca and Cola, commenting on those two drugs. There is no association in this book between one and the other, but the idea of coupling the two together I got from this book. They were of the same relative medicinal properties, both nerve tonics. We had previously used a mixture of coca and the idea of coupling them was from this book. For some years we had used this 'Coca-Cola' from a shelf bottle,—I use the word 'shelf bottle' to distinguish it from a proprietary medicine. For a while I used it myself just for dosing out. It gradually grew up to the proprietary form in which it is now sold. In 1888 we put it up in the form of a patent medicine. Q. Is the term 'Coca-Cola' original with you? A. Yes, sir,—that is, the coupling of the words. Q. The compound word? A. Yes, sir; the catalogue makes no mention of them together; they have no association with each other; the idea of coupling the two together was original with me." *(p. 12, Defts. Exhibit 68).*

CHARLES E. CLOSTER, of Mt. Vernon, New York, formerly in the employ of Benjamin Kent, at Paterson, New Jersey:

"I worked for Mr. Kent for four years prior to October, 1888. * * * Q. You say this 'Coca-Cola' was talked of in the latter part of 1885? A. Previous to that. * * * Q. How was the talk of it originated? A. It came from Fred Stearns' price list. It was a time when we had several preparations of coca on the market, and, looking over Stearns' list, we struck on the name 'Coca-Cola' and that is where the name originated. We put up the same preparation at the time, but we had no name for it until we struck Stearns' list. * * * It was not known as that until we got the name out of Fred Stearns' list. The name 'Coca-Cola' originat-

> ed somewhere in the latter part of 1885. We made the preparation previous to that, but had no name for it that I can remember,—simply that it was a coca tonic, that is all; but we applied it from that list, and printed a list with it in. * * * Q. Previous to that time it was not known as 'Coca-Cola'? A. No, sir. Q. Simply 'the coca preparation'? A. Yes, sir." *(pp. 4, 5 and 6, Defts. Exhibit 68).*

Kent's registration of "Coca-Cola", applied to his tonic, is in evidence as *Defendants' Exhibit 70, p. 1.*

Defendants' Exhibit 180 is a copy of a trade-mark registration for "Coca-Malta" tonic, which was registered February 9th, 1886, a reproduction of which is exhibited on the opposite page.

It would not make "Coca-Cola" non-descriptive even if it were established that only foreigners and scientists were familiar with the meaning of the terms "coca" and "cola" at the time plaintiff's mark was adopted.

United States v. Coca-Cola Co., 241 U. S., 265, (Mr. Justice Hughes):

> Nor would it be controlling that, at the time of the adoption of the name, the coca plant was known only to foreigners and scientists, for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. *Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation.*

It will be evident, however, that the record shows that in and prior to 1886, both "coca" and "cola" were words whose meaning was well known, not only to druggists but to the general public and that the drugs themselves

STIGER'S
PHOSPHATED
COCA-MALTA
TONIC

were in common use, not only in ethical but in proprietary or domestic medicines as well.

ORIGIN OF "COCA-COLA".

In 1885, Dr. Pemberton with F. M. Robinson, Ed. Holland and D. D. Doe, organized the Pemberton Chemical Company, to exploit "Pemberton's French Wine Coca", and Dr. P mberton's other remedies. By 1887, the trade on the "Wine of Coca" began to play ' (Rec., 328). Like all other coca wines and so-called cordials, it was marketed in quart bottles and re- ed for a dollar. (Rec., 329; 348; 378). But Dr. mberton knew from his own experience how insidiously the drug cocaine takes hold of its unsuspecting ctims, and how tenaciously it holds them in its grip. ith the cunning of the drug-addict, he conceived the heme of foisting his "tonic" on the public generally d reaping untold wealth from the hapless victims who quired the habit. His plan was to popularize the thing and bring it within reach of every one, rich and poor, regardless of age or sex, by dispensing it at soda fountains, as a medicated, or "tonic" beverage at 5c per dose, —very much as bromo-seltzer, capudine, sedlitz-powders, and other headache remedies were administered, and, as the medicated "tonic" beverage known as "Moxie", which had some time before this, taken the market by storm, was then being dispensed.[9]

[9]**MOXIE NERVE FOOD CO., vs. BAUMBACH, et al.,** 32 Fed., 205. "In this case it would appear that Augustin Thompson, M. D., early in 1885 manufactured a beverage called by him 'Moxie Nerve Food', and, deeming it of great value commercially, filed with the United States Commissioner of Patents an application for a trade-mark therefor on the 16th day of July, 1885, which was afterwards registered in the patent office, Sept. 8th, 1885, and from which it appears that such trade-mark had only been in use since April 1st, 1885; the term 'Moxie' being the trade-mark word, while the label included a picture and other descriptive words Thompson sold this trade-mark to complainant in July, 1885, and the complainant has used the same as his trade-mark and label ever since. *** Shortly after the Moxie Nerve Food Company got under full headway, quite a number of

Accordingly, in May, 1886, he revised the "Wine of Coca" by changing it from the form of a wine to the form of a syrup, the better to adapt it to use at soda fountains. The revision consisted simply in the elimination of the Bordeaux wine and the fluid extract of damiana, and the substitution of a simple syrup consisting of a solution of sugar dissolved in water.

Except for the damiana, the "tonic properties" remained the same. There was no change in the flavoring extracts (Rec., 656). The syrup did not have the deep rich wine color of the wine, or the color of the earlier "Moxie", but this difficulty was overcome, and the color of the syrup was made to resemble that of the wine, and of "Moxie", and in fact that of all preceding "tonic" or drug drinks, such as sarsaparilla and root beer, by the use of the artificial coloring agent known as caramel, or burnt sugar, coloring. To avoid confusion, it was necessary to give the revised product a separate name, and, besides, as it was no longer a wine but a syrup, it would have been inaccurate to continue to call it *"Wine* of Coca". However, it was still essentially a mixture of the extract of coca and caffeine, and F. M. Robinson thought the most apt and appropriate name for it would be to call it "Coca-Cola". That name would quite naturally lead the public to believe that it was essentially a compound of the drugs coca and cola, and would enable the Pemberton Chemical Co. to *profit by the great demand that existed at that time for preparations of that character.*

persons or nerve food companies sprung up, claiming to manufacture or sell nerve food **beverages,** and all manufacturing a beverage of the same, or very similar, taste, flavor and odor to that of the complainant."

F. M. ROBINSON:

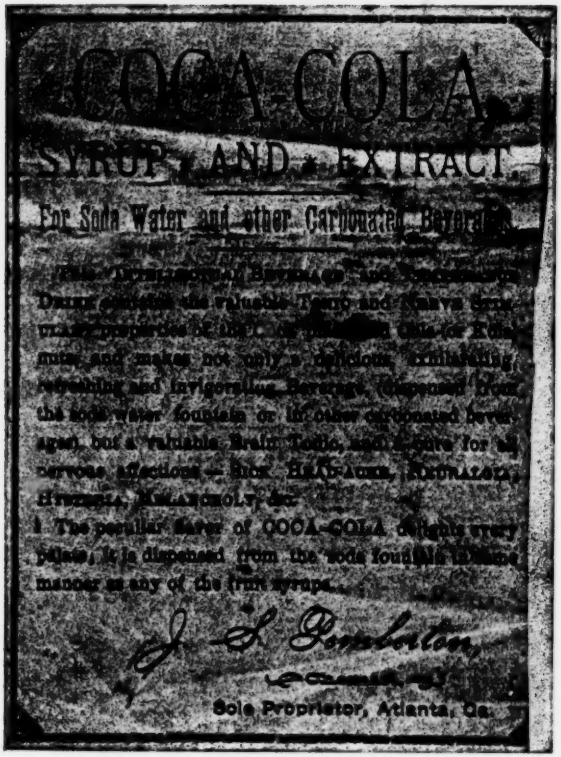
"I came here (Atlanta) from Lyons, Iowa, in December, 1885, accompanied by Mr. D. D. Doe. * * * Messrs. Pemberton, Ed. Holland, D. D. Doe, and I then formed a stock company known as the Pemberton Chemical Company, a copy of the charter of which is the paper exhibited to me. * * * Dr. J. S. Pemberton had been in previous years a druggist, but he was then what you might call a manufacturing chemist. He put into the corporation several preparations, the principal of which was 'Pemberton's French Wine of Coca', which was a patent medicine selling at a dollar a bottle, and there was a preparation called 'Gingerine', 'Indian Queen Hair Dye', and 'Pemberton's Globe Flower Cough Syrup'. During that period Dr. Pemberton was continually experimenting on other drinks and chemical combinations. Well, he was not compounding anything particular at that time, I think, outside of these that were put into the business and until the time of this preparation, 'Coca-Cola'. The preparation 'Coca-Cola' was not made immediately after the organization of said company, but several months afterwards it was, some five months, I guess, after this charter was applied for. We commenced making what we called 'Coca-Cola' in May, 1886. * * * This product had no name in the beginning,—it was being experimented upon. Dr. Pemberton compounded a preparation, it was taken down to Mr. Venable's soda fountain for the purpose of trying it to ascertain whether it was something that people would like or not, and, after they had made various changes in the compound, it seemed to be satisfactory, and then the question came up with reference to having a name for it. There were four of us in the corporation, and they agreed to submit four names, each one of the members submitting a name. *I submitted the name 'Coca-Cola' and it was afterwards adopted and used.* * * * *The syrup was given this name on account*

of the extracts which it contained, 'coca' and 'cola' made from coca leaves and from the cola nut." (Rec., 347-354.)

WHAT THE ORIGINAL "COCA-COLA" WAS HELD OUT TO BE.

On July 27th, 1887, Dr. Pemberton registered in the Patent Office, in his own name as sole proprietor (Rec., 349), the label with which all packages or containers of this "Coca-Cola" were labeled, a photograph of which, duly authenticated by the Commissioner of Patents, is in evidence as *Defendants' Exhibit 271*, and is reproduced on the opposite page.

From this label we learn that this "Coca-Cola" like the "Wine of Coca", was "stimulating, refreshing, exhilarating and invigorating"; that, like the "Wine of Coca" it was an "intellectual beverage", and a "valuable brain tonic"; that, like the "Wine of Coca", it contained "the valuable tonic and nerve stimulant properties of the coca plant and cola nuts"; and, that, like the "Wine of Coca", it was "a cure for all nervous affections,—sick headache, neuralgia, hysteria, melancholy, etc." It differed from the "Wine of Coca" in that, not being a *wine* but a syrup, it was a "*temperance* drink" and was "dispensed from soda water fountains", in the form of "a beverage", or else taken "in other carbonated beverages" as a pleasant means of administration. In all essentials it was the same as the "Wine of Coca"; it differed only in its incidents. It had the same medicinal ingredients, was advertised and sold for the same purpose and to cure the same ailments, and had the same effect on those who took it. F. M. Robinson admits that "some of the same material, perhaps, went into both" (Rec., 365) and that, "I don't know but there was some 'Coca-Cola' manu-


COCA-COLA
SYRUP AND EXTRACT
For Soda Water and other Carbonated Beverages
Sole Proprietor, Atlanta, Ga.

factured in the same tank,—mixed in the same tank as he 'Wine of Coca', possibly." (Rec., 365.) An extract containing the medicinal agents was made up, and then, when they wanted to make "Wine of Coca", they put it into the wine, and when they wanted to make "Coca-Cola", they put it into the syrup.

A. O. MURPHY:

> "We put the extract into the wine (in making 'Wine of Coca') in place of putting it into a syrup." (Rec., 1287).

Mention has been made of the reference on Asa G. Candler's letter-head to Coca-Cola "containing the tonic properties of the wonderful coca plant and the famous cola nut", (Plaintiff's Exhibit 76), and to the "copyrighted medicinal article known as Coca-Cola" in plaintiff's charter (Plaintiff's Exhibit 1).

Later the plaintiff prosecuted an interference contest with Benjamin Kent who used his mark "Coca-Cola" on a medicine, so that plaintiff's Coca-Cola must have been regarded as a medicinal article as, otherwise, there would have been no interference, beverages and medicines being goods of different descriptive properties. In the end, the plaintiff prevailed in this contest on a technicality, owing to a mistake made in preparing Kent's application. (See *Defendant's Exhibit 70).*

THE INGREDIENTS OF THE PRESENT-DAY "COCA-COLA".

"MERCHANDISE No. 5."—

Charles Howard Candler, Vice-President of The

Coca-Cola Company, tells what plaintiff's so-called "Coca-Cola" now consists of:

> "There are eight ingredients, or groups of ingredients, that enter into the mechanism of 'Coca-Cola' syrup. One ingredient is burnt sugar coloring, or caramel; one is sugar; one is phosphoric acid; one is lime juice; *one ingredient is caffeine, and that is put in in the pure state;* one consists of flavoring oils dissolved in alcohol. There are a number of flavoring oils in that extract,—they are concentrated oils and have a strong flavor. In addition to that we put glycerine into the syrup, and *a product which we call 'Merchandise No. 5'.* * * * We put water in 'Coca-Cola' too; that makes nine ingredients." (Rec., 442-3.)

The ingredients described as "Merchandise No. 5" is the only one that is pretended to supply any of the properties of either coca or cola to the preparation. It is supposed to contain an extract of coca and cola; but as a matter of fact, it contains little or nothing derived from cola nuts, and practically nothing derived from coca leaves. It is chiefly just 20 per cent. alcohol. In the preparation, it has no effect whatever on its character, or even its taste.

When, in 1899 or 1900, plaintiff discontinued the use of coca extract in its drink, it arranged with the Schaeffer Alkaloid Works, which is perhaps the largest manufacturer of cocaine in the world (Rec., 446) to make a percolate of spent (exhausted) coca leaves which had been treated to remove the cocaine, and the use of this percolate which consists of weak alcohol containing a little tannin and possibly minute traces of inert substances, is plaintiff's only justification for the use of "Coca" in its name.

The spent coca leaves are worthless, the Schaeffer Alkaloid Works extracting and selling to others everything of any value which the leaves contain.

DR. JOHN A. WESENER, (plaintiff's Chemist):

> "I don't know of any other use to which the exhausted coca leaves * * * have ever been put to by anybody, except to be put into this 'Merchandise No. 5'. So far as I know they have never been put to any other use. (Rec., 927). * * * I have seen what is known as 'Merchandise No. 5' manufactured at Maywood, N. J., by the Schaeffer Alkaloid Works. (Rec., 923.) You ask me if they extract the cocaine from the coca leaves, in the process of making cocaine, in substantially the same way as they do in making this 'Merchandise No. 5'; well, they use a similar solvent in removing the cocaine from the Erythroxylon coca. *Yes, they take the cocaine out in the same way. It is one of the processes of removing cocaine from coca leaves.*" (Rec., 927.)

CHARLES HOWARD CANDLER:

> "Presumably Dr. Schaeffer takes the cocaine that he extracts from the coca leaves in this process of manufacturing 'Merchandise No. 5', and sells it on the market as cocaine." (Rec., 446.)

THE DECOCAINIZING PROCESS.

The process to which the Schaeffer Alkaloid Works subjects the coca leaves in extracting the cocaine from them for commercial use, and which, therefore, constitutes the first step in the preparation of the leaves for the manufacture of plaintiff's "Merchandise No. 5", (Rec., 446; 927) is thus described by Dr. Charles E. Caspari, of St. Louis, (plaintiff's witness):

"*The coca leaf is first powdered very finely*, and *then mixed with about an equal bulk of sawdust*, and to that is added a sufficient quantity of dilute solution of sodium bicarbonate for the purpose of rendering the leaf alkaline in order to free the alkaloids. Then it is packed in a percolator and is extracted with toluene. After this extraction is complete, and all the alkaloid is removed,—it being understood that the toluene, as it percolates through the leaf, drips and is collected,—*live steam is blown up through the leaf*, which has been exhausted of the alkaloids, to remove every trace of the solvent toluene. * * * That is the decocainizing process. * * * The toluene I speak of is what is known as a hydrocarbon. * * * Toluene comes from coal tar. The object of putting saw dust with the coca leaf is to make the extraction more easy. A large majority of drugs are mixed with some inert material. When they are extracted for the purpose of obtaining the active principle, whatever it may be, in order to make the percolation easier, sawdust may be used, or exhausted bark or roots,—what is commonly called marc,—and some other drug is used as a dilutent; sand is sometimes used, to keep the mass from packing too closely. It is a mechanical reason, not a chemical one. This makes the percolation easier by separating the small particles of the leaf into which the leaf has been ground or powdered and keeping them from packing in that way. (Rec., 905, 907). * * * The coca leaf is treated with bicarbonate of soda in a very dilute solution, the object being to free the alkaloid in the leaves so that it can be dissolved and taken out by the solvent. That alkali, the bicarbonate of soda, still remains in the drug after it has been treated with the solvent. *Then this drug is soaked for several days in a volume of six or eight times its volume.*—I cannot answer that accurately because I do not know positively,—*of the solvent toluol;* the toluol was probably eight times in volume or weight of the amount of the drug used. This drug is treated

for the extraction of the alkaloid by the process of *maseeration and percolation.* Of course, the toluol that first comes off is much richer, and the last of it contains practically no alkaloid at all. * * * *Steam at 60 pounds pressure would be 257 degrees Farenheit.* I cannot say accurately as to the time required by this process of distillation to remove all the toluene from the drug,—I should say a couple to several hours, *which might mean from two to five, depending upon the quantity of the compound to be made up at that time, chiefly, and whether the steam was exactly at 60 pounds pressure, or a little less or a little more.*" (Rec., 918, 920.)

Dr. Caspari explains that the prime object of this treatment of the leaf is to remove every trace of the cocaine and allied alkaloids They must be removed at all hazards, no matter whether anything else is left in the leaf after they have been extracted or not:

"No, I won't admit that this process for decocainizing coca is a rugged, harsh process to which to subject a drug expecting to obtain from that drug any of its natural properties after having been so treated, because the prime object of this treatment in the first place is to remove the cocaine and the alkaloids. They must be taken out absolutely so that not a trace is left. That requires the treatment I have explained. That is the prime object of the process." (Rec., 921.)

A pretty fair idea of what this treatment does to the coca leaf may be gained from a consideration of what it will do to tea leaves, which are closely analogous. Dr. Caspari says:

"No, if you were to take a sample of tea, treat it with an alkali as explained, soak it several hours in toluene, drive off the toluene by several hours of distillation with a high pressure of steam of two

hundred and fifty-seven degrees Farenheit, in which a very large amount of water is obtained in distillate, I do not think that the tea so treated could be made into a presentable article for drinking; because we drink tea primarily for the caffeine which it contains, and that would be removed in this process which you describe. *But not only would the caffeine be removed, but its taste would be entirely modified.*" (Rec., 921-922.)

BALANCE OF PROCESS OF MAKING "MERCHANDISE No. 5".

After the cocaine and associated alkaloids and, in fact, *everything soluble in toluene*, have all been thus extracted from the coca leaves for commercial use, and everything of a volatile nature driven off by steam at sixty pounds pressure and at a temperature of 257 degrees Farenheit for from two to five hours, then the spent pulp remaining is stated to be submitted to the following treatment to complete the manufacture of "Merchandise No. 5".

DR. CHARLES CASPARI:

"The coca leaf is then mixed,—understand, now, that we have 380 pounds of it to start with,—with 125 pounds of cola nuts, and they are exhausted with an alcohol of about 18 to 20 per cent. in strength. This is then racked off and pasteurized, and is then the finished product. That makes 900 gallons of the finished product,—the 380 pounds of coca leaf and 125 pounds of cola nut, when treated in this manner, make 900 gallons of 'Merchandise No. 5'. In making these percolations, about 900 gallons of 18 to 20 per cent. alcohol are used." (Rec. 911.)

THE FUNCTION ATTRIBUTED TO "MERCHANDISE No. 5".

Plaintiff attempts to justify its action in palming off as "Coca-Cola" a preparation containing nothing more from either the coca leaf or the cola nut than is supplied by this "Merchandise No. 5", by pretending that the minute traces of inert substances thus obtained from the coca leaf and the cola nut impart a *taste* and *flavor* to its product.

DR. JOHN A. WESENER:

> "From a strictly chemical and medicinal standpoint, *the characteristic property of the coca leaf is removed in making this 'Merchandise No. 5'*, but not from a food standpoint or flavor standpoint. (Rec., 928.) * * * It is the residue that contains various principles which are very essential to the manufacture of Coca-Cola Syrup." (Rec., 926).

This position was also taken by the Coca-Cola Company in the case of *United States v. The Coca-Cola Company*, 241 U. S., 265; 60 L. Ed. 995. In that case, Mr. Justice Hughes, who delivered the opinion, in stating the plaintiff's contention, said (241 U. S., 272; 60 L. Ed., 999):

> "It is further stated that, in manufacturing in accordance with the formula, certain extracts from the leaves of the coca shrub and the nut kernels of the cola tree were used for the purpose of obtaining a *flavor*, and that 'the ingredient containing these extracts', with cocaine eliminated, is designated as 'Merchandise No. 5'."

COCA AND COLA WERE NOT ORIGINALLY SET FORTH TO THE PUBLIC AS FLAVORS BUT AS DRUGS.

From the evidence in this case and particularly the Pemberton label (Defendants' Exhibit 271), it is very clear that at the outset, it was the tonic and nerve stimulant properties of coca and cola which were advertised to the public, and not the separate or combined flavors of these drugs.

IT WOULD BE A FRAUD TO SELL, AS "COCA-COLA", A PREPARATION PRACTICALLY DEVOID OF COLA AND DEVOID OF THE CHARACTERISTIC PROPERTIES OF COCA, EVEN THOUGH A FLAVOR COULD BE OBTAINED FROM COCA LEAVES AND COLA NUTS.

DR. WILLIAM M. SIMONSON:

> "If all the alkaloids and all the essential oils were extracted from the coca leaf, I would not consider it longer as coca. *If all the morphine were extracted from opium, what was left would not be opium. If all the strychnine was extracted from nux vomica, what was left would not be nux vomica.*" (Rec., 2511.)

JOHN W. ROSSITER, (plaintiff's witness):

> "The alkaloid cocaine is the active principle of the coca leaves. Take that and the (other) alkaloids out of the coca leaves, and there is not much of the coca leaf left. * * * *You have taken the spirit out of the body.*" (Rec., 936.)

DR. JOSEPH JACOBS, (plaintiff's witness):

> "Besides cocaine, coca leaves have in them ex-

tractive matter,—*cocaine is the only thing of any importance.*" (Rec., 410.)

COCA AND COLA ARE NOT IN FACT FLAVORING AGENTS.

DR. J. J. KESSLER:

"The coca leaf * * * contains not much of any flavoring substance. It has not much odor or flavor." (Rec., 2467.)

DR. H. C. FULLER, (plaintiff's witness):

"The aroma of coca leaf does not mean very much. Of course, all leaves have an odor which you might call aroma. * * * I could not detect coca leaves by odor alone; that would be impossible. No, I could not detect coca leaves by odor alone. You ask if coca leaf has a characteristic odor; it has an odor that is characteristic of leaves, but other leaves have very similar odors, so that I would not want to take a bag of leaves and smell it and say it was coca leaves." (Rec., 2361-2.)

And again, when asked what other leaves smell similar to coca leaves, he replied:

"I cannot say about that,—lots of leaves of different kinds." (Rec., 2362.)

DR. J. J. KESSLER:

"The cola nut has practically no flavoring qualities whatever. Cola nut is a hard, woody nut. When you chew the nut it tastes like so much hardwood sawdust. It tastes a little bit bitter, but has no more flavoring in it any more than hardwood sawdust has a flavor,—perhaps not as much." (Rec., 2468.)

SUCH OF THE INGREDIENTS OF THE COCA LEAF AS COULD IMPART ANY FLAVOR DO NOT ENTER INTO "MERCHANDISE No. 5".

According to plaintiff's own showing, the 20 per cent. alcohol with which the spent coca leaves are finally extracted would not extract, even from the unexhausted leaves, any properties that could impart odor or flavor; much less would it extract any such properties from the exhausted pulp that remains after "decocainization". Dr. H. C. Fuller, plaintiff's own chemist, sets out fully what the 20 per cent. alcohol would extract from coca leaves.

> "If you used twenty per cent. alcohol, and the coca leaves were the ordinary Erythroxylon coca, you would get from the coca leaves *cocaine and the light alkaloids, tannin, and probably a little chlorophyll,* and *any mineral matter* that was present *soluble* in the alcohol mixture, and *probably a little protein matter.*" (Rec., 2356.)

That these properties, with the possible exception of the tannin, could not impart the slightest flavor or aroma, is frankly admitted.

DR. CHARLES E. CASPARI:

> "Cocaine does not in the least add anything to the flavor of a product." (Rec., 905.)

DR. H. C. FULLER:

> "You ask if cocaine has any taste. * * * It would not impart a flavor to anything to which it had been added. * * * None of the other alkaloids in the coca leaf has any flavor." (Rec., 2357.)

DR. J. J. KESSLER:

"Chlorophyll is the chemical substance which gives the green color to all green-colored plants." (Rec., 2469.)

DR. H. C. FULLER:

"I don't know of any flavor that chlorophyll has; *it is not a flavoring agent.*" (Rec., 2357).

DR. CHARLES E. CASPARI:

"This chlorophyll is a substance that is common to all green vegetation. * * * I do not suppose chlorophyll has any physiological properties. * * * *It is an inert substance,* no question about that." (Rec., 908-9.)

DR. H. C. FULLER:

"* * * Neither the flavor nor aroma of fluid extract of coca material would be changed or modified by the absence of that protein or mineral matter from the fluid extract of coca. *The only thing obtained from the coca leaf and which is present in this extract that we have been speaking of,—extracted in the manner heretofore outlined,—that really has got a flavor, or that really tends to flavor anything in which it is put, would be the tannin.* (Rec., 2357-9). * * * Q. *Is tannin a flavoring agent?* A. *No, sir, it is not.*" (Rec., 2390.)

But even if 20 per cent. alcohol could extract from the coca leaves, before they are "decocainized" any of the slight flavoring qualities they may possess, nevertheless it is certain that it could not do so after the leaves are "decocainized" for the very good reason that *such properties are removed from the leaves, along with the alkaloids, in the "decocainizing" process.*

DR. H. C. FULLER:

> "Q. Would, or not, any of the flavoring matter be removed from the coca leaf in the process of extracting it by means of toluol,—and, if so, how and why?—before it went into 'Merchandise No. 5'? A. *Yes, sir, they would all be removed.* Q. Now, in what process? A. *By the toluol and by the subsequent steaming process.* Q. How does the steam serve to remove the flavoring matter and odors? A. They are removed because they are volatile. That is the process used to remove the flavoring agents from a great many flowers, leaves, and things. Q. Why would this toluol remove any of them? A. *Because they are very soluble in oily mixtures of that kind.*" (Rec., 2384-5.)

The only constituents of the coca leaf that could impart any taste or odor are the essential oils,—and perhaps, the tannin, and the trace of wax that is present.

DR. J. J. KESSLER:

> "The thing which gives it the odor is the essential oil in it. * * * (Rec., 2467.) * * * The essential things as far as flavor is concerned are the essential oils. (Rec., 2474.) * * * If the essential oils are extracted from the coca leaf by some chemical process, then they are spent as far as taste is concerned. * * * There only remains the taste of *such* (so much) vegetable matter, which you get by boiling pretty nearly anything up,—any sort of leaves, with water. The aroma and boquet of the leaves under those circumstances, is removed; it is gone." (Rec., 2468.)

DR. CHARLES E. CASPARI attributes some slight flavoring properties to the tannin and the wax, also:

> "No, all of the ingredients left in the leaf do not

have a taste. * * * It is just some of those ingredients that give the leaf its taste. * * * The wax imparts the taste of coca wax. * * * I should say this wax also imparts an aroma, because all waxes do. The other things which give taste and aroma are the tannin and the oil." (Rec., 910.)

Dr. Caspari has never made any actual tests to determine whether or not the essential oils are removed during the toluene extraction and the steaming process, and, therefore, is not in a position to give any definite information upon the subject; but even he is of the opinion that some of the essential oils might be extracted by the toluene solvent, and that others would unquestionably be volatilized and driven off by the steam along with some of the resin. Thus:

"No, the oils which I refer to as remaining in the coca leaf would not necessarily be extracted by the toluene in the percolation process. That is *paramount* (tantamount) to saying that all oils would be soluble. Some oils undoubtedly would and some would not. The oils in the coca leaf, I believe, would not be,—at least, not entirely. Some of them might be extracted, but I cannot say that they are. *I have never made a determination to prove that they are not.* (Rec., 912). * * * No, it is not true that if a substance were treated by a current of hot steam at a temperature of 250 degrees Farenheit for from two to five hours, that all of the substance which is volatile would be carried away in every drug that could be so treated. I know of an instance where that would not be true. That is the distillation of ajowain seed for thymol. * * * That might be considered an exception to the general rule. (Rec., 920). * * * Some of the oil would be volatile. Some of the oil in the coca leaf is an essential oil, and by essential oil I mean one that can be volatilized without decomposition. Some of that would go off, and perhaps the least bit of

> resin. That is all I think could be volatilized. (Rec., 907). * * * The only way to decide that will be to actually make a test of whether there is anything volatile left in there after that experiment has been made." (Rec., 920.)

Dr. Caspari has made no such test, and if any oils remained after treatment with 100 per cent. strength of the solvent toluene, it is hardly to be expected that they would be extracted by a 20 per cent. solution of alcohol.

DR. JOHN A. WESENER is of the opinion that toluene might remove some of the oils, and probably some of the wax:

> "Besides cocaine, toluene takes out of the coca leaf the other alkaloids, too. I don't believe it takes out many other principles. It may take out some of the oils,—probably some traces of wax that are soluble in toluene. I imagine that coca wax might be slightly soluble in toluene." (Rec., 932.)

DR. H. C. FULLER, states without reserve that "toluene extracts the wax from the leaf," (Rec., 2369) and he proves it, later, in his process of extracting the caffeine from plaintiff's product with chloroform to determine the percentage of caffeine which it contains. Thus, he says:

> "The chloroform does not extract anything from the syrup besides caffeine in the case of genuine 'Coca-Cola' syrup, but, in the case of any of these other products, I have analyzed, it sometimes does. * * * It is apparent that in some instances it drowns out certain things from the flavor,—that has happened in some instances,—certain resinous constituents, waxy substances of unknown determination. (Rec., 2276). * * * I said the kind of substance that sometimes comes out with chloroform is resin

ous and waxy substance. * * * It is, for instance, a substance like beeswax. (Rec., 2277). * * * It is an inert material which does not dissolve in water. (Rec., 2279). * * * *I want to state emphatically now that these waxy and gummy substances spoken of were not in 'Coca-Cola'."* (Rec., 2313.)

DR. WILLIAM M. SIMONSON:

"Toluene would extract from the coca leaf any fatty material, wax, chlorophyll, any essential or volatile oil. That is about all for the natural leaf. * * * It would extract the free-alkaloids, alkaloids set free by a base, such as (bi) carbonate of soda, for example. I have read the testimoy of Dr. Caspari in this case as to the method whereby 'Merchandise No. 5' is made for the 'Coca-Cola' syrup. By the process which he uses, toluene would take out of the coca leaf the organic bases so far as they are in a free state, *any waxy material,*—probably take out all of it,—take out *any fixed volatile oil,* or (and) it would likewise dissolve no small part of the resinous material present, and likewise of the chlorophyll. *The flavoring properties are due, if I understand, to volatile material and practically they would be dissolved entirely by the toluene."* (Rec., 2502-3.)

Neither Dr. Caspari nor Dr. Wesener had made any actual test to ascertain just what is, in fact, removed by toluene and the steaming process, or what finally goes into "Merchandise No. 5". The opinions they give are largely speculative. Dr. Wesener frankly admits that he is not sufficiently informed to intelligently discuss the subject:

"I do not know that toluene is the best solvent for taking out everything from the coca leaves. There may be other solvents that will take out more products than toluene, whereas toluene may simply

confine itself largely to the extraction of cocaine, and do it thoroughly. That is something, as I say, I cannot go into, because I have not looked up that particular phase of the subject. * * * I would have to look that up and investigate that further." (Rec., 932).

But Dr. J. J. Kessler did make a very thorough and painstaking test, and determined with scientific precision and accuracy just exactly what the toluene does remove, and just exactly what does eventually enter into "Merchandise No. 5". Thus:

"I have read the testimony of Dr. Caspari in this case as to the method by which this ingredient (that) goes into 'Coca-Cola' syrup, known as 'Merchandise No. 5' (is prepared). I prepared 'Merchandise No. 5' according to the method described by Dr. Caspari. * * * I analyzed the toluene extract. * * * It is not true that toluene extracted from the coca leaf only the cocaine and associated alkaloids. My tests show that toluene extracts six times as much other material as it extracts cocaine. * * * *The toluene extracted from the coca leaf, by this method, all the oils, fats, waxes, and resinous substances found in the leaves.* It also extracted much, if not most, of the chlorophyll. It extracted most of the flavoring principles of the coca leaves. It extracted a large portion of the cocaine. I found 3-100 of a percent. of cocaine in coca leaves which had been extracted by this process, by toluene, as against 60-100 of a per cent. which they contained normally. The color of the toluene extract I got from the coca leaves was a very dark green color, almost black. That color was due to the chlorophyll extracted from the leaves. Chlorophyll is a chemical substance which gives the green color to all green colored plants. * * * The toluene extract which I made contained *.188* (4.88) per cent. of solid matter. This is six times the amount of co-

caine present in the leaves ordinarily—(that is) five of these parts are things which are not (cocaine). These five parts consist entirely of what I call resinoids,—that is, they are waxy gums and oils which are not soluble in water but which are soluble in toluene. The toluene extract consists practically entirely of those two things,—that is, one part of cocaine, and five parts of resinoids. There is a small amount (of) remaining extractive, which amounts to a few per cent. outside of those two substances. That remaining extractive,—well, it is hard to say what it is, except that it is extractive which is afterwards soluble in water. It might have small traces of starch, or it might be a number of different things. (Rec., 2469-70). * * * I made an analysis of coca leaves,—that is, a formal analysis outside of this preparation of 'Merchandise No. 5',—and found that the toluene extracts 4.9 per cent. of material. That is the figure from which I based my conclusion that toluene extracts six times as much other material from the coca leaves than the cocaine present. It should be more nearly eight times, but six times is the figure I gave." (Rec., 2472-3).

Then, to check the results thus obtained, and at the same time to determine just exactly what substances from the coca leaf enter into "Merchandise No. 5", Dr. Kessler made up a sample of "Merchandise No. 5" according to the process described by Dr. Caspari, but left out the cola nuts. In other words, he "decocainized" the coca leaves with toluene and steam, and then extracted the residue with twenty per cent. alcohol:

> "I made an analysis of 'Merchandise No. 5' made up according to this process that I have mentioned from coca leaves and sawdust, but leaving out the cola nuts. *The result was that it contains no gums, resins, fats, waxes or oils.* It * * * contains 1.9 per cent. tannin and 1.16 per cent. indefinable extrac-

> tive matter, such as starchy substance, gummy substance, sugar, perhaps,—all material which is soluble in water. Practically half of tannin and half of indefinable extractive. (Rec., 2470-1). * * * The purpose of using sawdust in the extraction of coca leaves with toluene is to separate the mass, so that the extraction is more thorough. *Something from the sawdust is extracted in that process.* In the latter process, after the toluene process is finished, and you take up the extraction of the exhausted leaves with alcohol, the alcohol extracts from the sawdust, * * * one sixth as much material as it extracts from the coca leaves. *That material which is extracted from the sawdust is a small amount of tannin,* and some more indefinable extractive. (Rec., 2472). * * * 'Merchandise No. 5' when made with cola nuts contains 2.25 per cent. of solid matter." (Rec., 2471).

Dr. Kessler shows just what value is to be attached to this tannin and "extractive matter" as flavoring agents:

> "In extracting the leaves with twenty percent. alcohol, after the toluene extraction, the extract which you get from that 'contains' *nothing but the tannin and the extractive matter, which contributes practically nothing to the taste, if not absolutely nothing.*" (Rec., 2473-4).

Dr. Caspari analyzed the "Merchandise No. 5" actually used by plaintiff in its so-called "Coca-Cola" syrup, but he did not detect the presence of anything that could have been extracted from the coca leaf except chlorophyll and tannin, or anything that could have come from the cola nut except caffeine. Thus:

> "I have made a number of determinations of 'Merchandise No. 5',***The last time I analyzed 'Merchandise No. 5' was just a few months before the trial above referred to at Chattonooga. I stat-

ed that in my analysis *I determined that there was chlorophyll and tannin in 'Merchandise No. 5'* but I did not determine the quantity. All I determined quantitatively was the alcohol and caffeine. I did not determine anything else quantitatively. I don't know whether, as a matter of fact, you can determine quantitatively anything else besides these four substances,—tannin, chlorophyll, alcohol and caffeine —in 'Merchandise No. 5'. I have never tried to. *I do not know whether the presence of the other substances could be detected or not.* I have never tried it. I dare say, with enough material available and enough time at one's disposal, it could be done." (Rec., 912-913).

On a number of occasions, Dr. Fuller (plaintiff's chief chemist) analyzed "Merchandise No. 5" that had been prepared for plaintiff by the Schaeffer Alkaloid Works, and he was never able to detect in it anything whatever from the coca leaves except the tannin, and, on one occasion, what appeared to be a very slight trace of chlorophyll. Thus:

"Yes, sir, I have analyzed some samples of 'Mershandise No. 5',—that is, the 'Merchandise No. 5' that forms the ingredient of 'Coca-Cola' syrup.*** It was when the Government cases were being worked up, and samples were being obtained from the different factories. *** I have also tested 'Merchandise No. 5' since I left the Government.***Since I left the Government I have tested it for its general composition, for the ingredients in it,—for the presence of extracts of coca and cola, and that is all. I don't know how many times I tested it while with the Government but it was several times. (Rec., 2360-1).***I tested it when with the Government for chlorophyll. I did not find any chlorophyll in it. (Rec. 2361).****You ask if I have ever been able in any of my analyses of 'Merchandise No. 5' to determine the presence of any of the properties of the*

coca leaf except the tannin; yes, sir, I have found traces of chlorophyll,—some, that is, very slight traces. (Rec. 2362).***I just observed it on a filter I was handling, and that was all,—a greenish characteristic appearance of chlorophyll. I went no further with it. (Rec. 2367).****Aside from the chlorophyll, which is not at all characteristic of the coca leaf and this tannin, I was never able to discover any other property of the coca leaf in 'Merchandise No.* 5' (Rec. 2363).***I performed several experiments with 'Merchandise No. 5' and tested it to see whether or not it had the characteristic flavor of extract of coca leaves. You ask if I detected any aroma characteristic of the coca leaf in 'Merchandise No. 5'; I don't know exactly what you mean. The aroma of the coca leaf doesn't mean very much.***You ask if I detected, so I would know it, the presence of any flavor in 'Merchandise No. 5', that was characteristic of the coca leaf, or of the extract of coca; I don't think so. (Rec. 2361). *** *There is no flavor or odor of coca leaf in 'Merchandise No.* 5.' (Rec. 2390).***Yes, sir, I did make a sample of extract of coca leaf, and that sample certainly did differ both in odor and flavor from 'Merchandise No. 5'." (Rec. 2370).

IF COLA NUTS ARE USED IN MAKING "MERCHANDISE NO. 5", NOTHING OF ANY VALUE FOR FLAVORING PURPOSES IS OBTAINED THEREFROM.

Dr. Fuller enumerates what would be extracted from the cola nut,as follows:

> "From the cola nut you would get caffeine, a quantity of theobromine, sugar, coloring matter, protein material, and get soluble mineral substances that are in the product." (Rec., 2356).

It is admitted that none of these substances would

have any effect on the flavor, taste or aroma of "Merchandise No. 5".

DR. CHARLES E. CASPARI:

"Cocaine does not in the least add anything to the flavor of a produce, *nor does caffeine.*" (Rec.,

DR. H. C. FULLER:
905).

"Caffeine has a taste; it is bitter. I don't know whether or not it adds any taste to a drink of this sort. I doubt it. *I don't think it affects the taste one way or the other.* (Rec. 2354).***Theobromine is not a flavoring agent.* I don't know what the coloring matter is in the cola nut which I spoke of a while ago. The protein material in the cola nut is probably more or less similar in character to the protein material which I spoke of as being in the coca leaf, *but* (and) the same is true with respect to the soluble mineral substances in the cola nut. You ask if the only flavoring agent in the extracts that have been talked about obtained from the cola nut is sugar; I don't know much about the flavors from cola. I am not qualified to express an opinion about it." (Rec. 2359).

After Dr. Kessler had made the tests heretofore described on "Merchandise No. 5" made without the cola nuts to find out just what is obtained from the coca leaves, he then tested "Merchandise No. 5" made exactly as Dr. Caspari says the Schaeffer Alkaloid Works makes it for plaintiff, cola nuts and all, and subjected to that analysis, with the following result:

"I made an analysis of 'Merchandise No. 5' made according to this process I have detailed, with coca leaves, sawdust and cola nuts, in the quantities specifled by Dr. Caspari. 'Merchandise No. 5' made

with cola nuts contains very little more substance than the 'Merchandise No. 5' made without the cola nuts. The cola nuts have very little extractive matter of any kind in them. (Rec. 2471).***The alcohol extracts from the sawdust half as much material as it extracts from the cola nuts. (Rec. 2472).*** This merchandise consists of 1.35 (per cent.) tannin and 1.03 per cent. of indefinable extractive, (and) contained no gums, fats oils, wax or resins. ***'Merchandise No. 5' made without cola nuts contains 2.25 per cent. of solid matter. When made with cola nuts it contains 2.38 per cent. solid matter, the remaining being alcohol and water. 'Merchandise No. 5' consists of 81.75 per cent. of water and 15.87 per cent. of alcohol. These percentages are by weight. I used 20 per cent. alcohol in making it by volume. It contains 2.38 per cent. of solid matter, of which practically half is tannin and the other half is indefinable extractive. It also contains 27-1000 of a per cent. of caffeine—that is, 0.027.*** 0.027 *of a per cent. of caffeine is not an appreciable quantity of it.* ***If 27 3-4 pounds of caffeine were used in making a batch of this kind of syrup, (1250 gallons of this syrup) there would be 700 times as much caffeine added as would be introduced by the caffeine present in 'Merchandise No. 5', made from cola nuts.***This would amount in percentages, to 3-10,000 of one per cent. of caffeine gotten from the cola nuts as against 21-100 of a per cent. of caffeine added, or *one is 700 times larger than the other.* I was simply going to say that you would have to drink 700 glasses to get as much caffeine from a product made entirely from cola nuts as you would get in one that is made with the added caffeine." (Rec. 2471-2472).

It is admitted that the total percentage of caffeine in plaintiff's product it .21 per cent. (*Dr. Fuller*, Rec. 2273).

"MERCHANDISE NO. 5" CONTAINS PRACTICALLY NOTHING AND APPARENTLY ABSOLUTELY NOTHING FROM THE COLA NUT.

Dr. Kessler was working with a mixture in which cola nuts had been actually used, and used in the quantities said by Dr. Caspari to be used by the Schaeffer Alkaloid Works in making plaintiff's "Merchandise No. 5". But it seems that, as a matter of actual fact, the "Merchandise No. 5" which the Schaeffer Alkaloid Works manufactures for plaintiff *does not contain anything whatever obtained from the cola nut.* The evidence seems to show conclusively that a minute quantity of pure caffeine but no cola nuts, is used in the actual manufacture of "Merchandise No. 5".

The amount of caffeine in cola nuts as in the case of all crude products, is not uniform, but varies from 1.5 to 3.6 per cent. of total alkaloids of which 1-100 to 1-40 is theobromine and the rest caffeine, (See foot note,[3] p.22) yet the percentage of caffeine in "Merchandise No. 5" is always exactly the same.

DR. CHARLES E. CASPARI:

> "I have made a number of determinations of 'Merchandise No. 5' and in each instance it had the same amount exactly of caffeine." (Rec. 912).

This would not exclude the possibility that some cola nuts are used and sufficient caffeine solution added to each batch to standardize it with respect to its caffeine content, provided the uniform caffeine content is equal to what it would necessarily be if cola nuts were actually used. But strangely enough, "Merchandise No. 5" has

less than half of the caffeine which it would have if cola nuts were used as plaintiff claims.

The quantity of caffeine which 20 per cent. alcohol extracts from powdered cola nuts is around .027 per cent., as shown by Dr. Kessler's actual tests. (Rec., 2471). But the "Merchandise No. 5" that plaintiff uses contains only .01 per cent.

DR. H. C. FULLER:

> "Q.—State whether or not you have examined 'Merchandise No. 5' with a view of ascertaining whether or not there was any cola shown, and, if so, what percentage of cola you found? A.—I stated that I found 1-100 of one per cent. of caffeine." (Rec. 2378).

Again, if cola nuts were in fact used in making "Merchandise No. 5", an analysis of it would show the presence not only of caffeine, which could be supplied much more cheaply in a pure state, but of theobromine and cola tannin, as both of these materials are present in cola nuts and are *extracted therefrom by a 20 per cent. solution of alcohol.* (Rec. 905 and 2356). But these cola identifying materials are not present in "Merchandise No. 5".

DR. H. C. FULLER:

> "The property of the cola nut which I found in 'Merchandise No. 5' was caffeine. I didn't find anything else. (Rec. 2363).****It is a fact that I did make analysis of 'Coca-Cola' syrup to determine whether there was any theobromine present, and that I never found any theobromine therein.* (Rec.2370).***No, I have never determined the quantity of tannin in 'Merchandise No. 5'. I de-

termined that (the) tannin in 'Merchandise No. 5' was coca tannin instead of cola tannin. (Rec. 2363)

***You ask if I am able to state definitely and certainly that the tannin which I discovered in 'Merchandise No. 5' was necessarily the tannin of the coca leaf and *not the tannin of the cola nut; I am absolutely positive that it was the tannin of the coca leaf.*" (Rec. 2364).

Dr. Caspari likewise admits that the only substance he was able to find in "Merchandise No. 5" that could have come from cola nuts was caffeine. (Rec. 913).

It would seem, therefore, that plaintiff merely puts a tiny speck of pure caffeine into "Merchandise No. 5", —a definite and uniform quantity being used each time —for purposes of analysis only, to afford some slight basis for the pretense that cola nuts are used in its manufacture.

"MERCHANDISE NO. 5" DOES NOT CONTRIBUTE ANY APPRECIABLE AMOUNT OF ANYTHING TO "COCA-COLA" SYRUP.

DR. CHARLES E. CASPARI:

"In making soda fountain syrup they use about 16 gallons of 'Merchandise No. 5' to make 1250 gallons of syrup.***It amounts to a little bit less than 2 per cent." (Rec. 911).

DR. J. J. KESSLER:

"If 16 gallons of 'Merchandise No. 5' were used in making 1250 gallons of 'Coca-Cola' syrup, the percentage of 'Merchandise No. 5' in the syrup by volume, amounts to something less than 2 per cent.; by weight, it figures exactly 1 per cent.,—one part per hundred by weight. In common chemical results, generally speaking, weights are used because

you can handle weights. You are handling quantity there, so that in my figures I am giving you, I am referring to percentages by weight almost entirely. There is now,—to every hundred pounds of syrup, there is one pound of 'Merchandise No. 5.' The solid matter contributed by 'Merchandise No. 5' to a hundred pounds of syrup is .002 per cent by weight. That does not contain any of the essential oils, or other flavoring material, the boquet, of either coca leaves, cola nuts, or acids. I have shown that that consists approximately of one-half tannin, one-half indefinable extractive material. The indefinable material has the taste —just like the taste —straw would have if you boiled it in water. It has no character. (Rec. 2474-5).***The percentage of solid matter in 'Merchandise No. 5' as compared with the percentage of other solid matter in 'Coca-Cola' syrup, I will only give round numbers, so that it will not be necessary to carry them out. There is 2,500 times as much sugar; there is 60 times as much caramel; there is 210 times as much caffeine; there is 60 times as much glycerine; there is 20 times as much phosphoric acid; there is 20 times as much of other flavoring matter; there is 30 times as much lime juice; and there is 2,000 times as much water. Those are all in round numbers." (Rec. 2478).

By adding these multiple figures, it will be seen that the quantity of total solid matter supplied to 'Coca-Cola' syrup by "Merchandise No. 5" is *one part in* 4,900. This is merely in round numbers. Dr. Fuller worked it out with the precise figures, taking into consideration the fractions which Dr. Kessler disregarded, and he found the proportion to be *one part* in 5,283.

DR. H. C. FULLER:

"Knowing that there are 15 gallons of 'Merchandise No. 5' put in the 1250 gallons of syrup, you, of

course, can at once figure how much of this would be due to coca and cola in that 1250 gallons. Q.—What did you find it to be? A.—One part in 5,283." (Rec. 2382).

DR. J. J. KESSLER:

"If you were to make up a glass of 'Coca-Cola', using, say 1 1-2 ounces of 'Coca-Cola' syrup, there would be 656 1-4 grains of total matter, including 271.55 grains of water and 386 *grains of solid matter.* The solid matter of 'Merchandise No. 5' in 1 1-2 ounces of 'Coca-Cola' syrup is .13 *of one grain.*" (Rec. 2478-9).

This .13 of a grain of solid matter thus supplied by the "Merchandise No. 5" is the sum total of everything that is derived from the spent coca leaves, the sawdust and the cola nuts (cola nuts having been actually used by Dr. Kessler in the "Merchandise No. 5" he prepared to make his tests with). In round numbers, the total contribution of "Merchandise No. 5" is 1-8 of a grain of solid matter. But Dr. Wesener admits that even 5-16 of a grain,—or in round numbers, 1-3 of a grain,—of fresh unexhausted coca leaves, which contain all the cocaine and other alkaloids they normally contain and all their other constituents in normal quantities, *is not an appreciable quantity of the drug.*

DR. JOHN A. WESENER:

"I do not know that five-sixteenths of a grain of coca leaves would be much of a quantity. It probably could be analyzed and proved that there were traces there, but *it would not be what I would consider an appreciable quantity.*" (Rec. 932).

Referring to the 2 per cent. of "Merchandise No. 5" that is used in making plaintiff's syrup, Dr. Fuller said:

"Q.—*Would, or not 2 per cent. impart a flavor to 'Coca-Cola' syrup?* A.—*It would not.* (Rec., 2389). ***Q.—Have you tried mixing 'Merchandise No. 5' with 'Coca-Cola' syrup to see whether or not any flavor is imparted to the syrup by the mixing of the 'Merchandise No. 5'? A.—No, sir, I have not—not with 'Coca-Cola' syrup. Q.—I didn't mean 'Coca-Cola' syrup, but syrup independent of the 'Merchandise No. 5' and then adding the 'Merchandise No. 5' to the simple syrup? A.—Yes, sir, I have. Q.—*State whether or not there is any taste imparted to the mixture after the 'Merchandise No. 5' is added?* A.—*There is not.* (Rec., 2386-7). ***Q.—Now I will ask you to state whether or not you have had occasion to test the 'Coca-Cola' syrup, as compared with 'Merchandise No. 5', and likewise as compared with coca extract, to ascertain whether or not there is any flavor imparted to the 'Coca-Cola' syrup by either 'Merchandise No. 5' or the coca extract? A.—I have. Q.—*Is there, or not any odor or flavor imparted thereby?* A.—*There is not.*" (Rec., 2383-4).

DR. J. J. KESSLER:

"Q.—Doctor, state whether or not the flavoring capacity that this remaining extractive you speak of the quantity of it that enters into 'Coca-Cola' syrup could possibly flavor or modify its flavor to any appreciable extent? A.—By limiting my answer to a question of fact, I have added *ten times the amount* of 'Merchandise No. 5' to 'Coca-Cola' syrup that there is ordinarily present in it, and I find that the introduction of this amount of 'Merchandise No. 5', which amounts to increasing the 'Merchandise No. 5' by 1,000 per cent., has no effect whatever to me on the taste of the syrup, with the exception that it makes it slightly less sweet and a little less sour, because it has diluted the syrup to some extent, but *it has not changed the flavor of the syrup in the least.* A bottle (marked *defen*

ants' exhibit 236) is original 'Coca-Cola' syrup which I purchased from a wholesale drug house in St. Louis in its original container. A bottle (marked *defendants' exhibit* 237) is the same 'Coca-Cola' syrup to which I have added ten times the amount of 'Merchandise No. 5' which it ordinarily contains. I stated that the syrup was a little less sweet and a little less sour, which is due to the dilution,—slight dilution,—of the syrup. The gravity of the syrup is reduced slightly by the introduction of this thinner material. It is reduced from 1.26 down to 1.23. I could not detect any characteristic flavor of the coca in the second sample, *Exhibit No.* 236 (237). It brought out nothing. *It added nothing in* (*to*) *the taste of the original syrup whatever.* The effect of adding to 'Coca-Cola' syrup ten times the quantity of 'Merchandise No. 5' that actually enters into it of water would have the same effect. It would dilute it that much. That is the only difference I noticed." (Rec. 2476-2478).

Plaintiff's chemists attempt to explain this away by stating that the flavor of "Coca-Cola" syrup is a composite flavor consisting of a blend of many flavors with no one flavor predominating, and that this is why the odors, aromas, and flavors pretended to be obtained from the coca leaves and cola nuts cannot be detected in the finished syrup. (Dr. Caspari, Rec. 914; Dr. Wesener, Rec. 929-30, and Dr. Fuller, Rec. 2319).

There is no magic or mystery in the word "blend". "Merchandise No. 5" is admitted to be a blend and the evidence shows exactly what the blended materials are. It is a blend of water, alcohol, a minute quantity of caffeine, which does not affect its taste (Dr. Caspari, Rec. 905; Dr. Fuller, Rec. 2354), a barely perceptible trace of chlorophyll, which is the coloring matter that gives the green color to all green vegetation (Dr. Caspari, Rec. 908; Dr. Kessler, Rec. 2469) and which has no taste

itself and cannot impart any (Dr. Fuller, Rec. 2356-7), and the tannin obtained from coca leaves and sawdust. In other words, the flavors and odors that are blended in "Merchandise No. 5" are the flavor and odor of 20 per cent. alcohol, of sawdust tannin—and coca tannin.

With this fact established, all that was left upon which it was possible to base the pretense that "Merchandise No. 5" is an extract of coca and cola and imparts the odors and flavors of those drugs to plaintiff's syrup, was the tannin which forms, with the 20 per cent. alcohol, the "blend" of "Merchandise No. 5".

DR. H. C. FULLER:

> *"The only thing obtained from the coca leaf which is present in this extract* we have been speaking of,—extracted in the manner heretofore outlined,—*that really has got a flavor or that really tends to flavor anything in which it is put, would be the tannin."* (Rec. 2358-9).

TANNIN IN "MERCHANDISE NO. 5" COULD NOT APPRECIABLY AFFECT THE FLAVOR OF "COCA-COLA" SYRUP.

Notwithstanding Dr. Fuller's previous unequivocal declarations that tannin is not a flavoring agent (Rec. 2390) and that "there is no flavor or odor of coca leaf in 'Merchandise No. 5' (Rec., 2390), he finally testified, "Tannin has flavoring properties; it might be termed a flavoring agent. It certainly adds to the blend of this product in a very pleasing way." (Rec. 2354), but before he finished, he makes it appear that his contention is a theoretical rather than a practical one.

> "It ('Merchandise No. 5') would unquestionably act as a blend, and the blend would produce the

very pleasant taste that 'Coca-Cola' has. Just how *appreciable* this would be is something I cannot say." (Rec. 2368-2369).

DR. WILLIAM M. SIMONSON:

"Tannin at least to my sense, has almost no flavor whatsoever." (Rec. 2506).

But if tannin has a flavor, it is present in such a small proportion in "Merchandise No. 5", that it could not affect the flavor of its syrup, because it would be diluted by water and other ingredients of the syrup, 980,000 per cent. Furthermore, as pointed out, it would be wholly submerged and lost in the presence of 5,000 times as much sugar, 120 times as much caramel, 420 times as much caffeine, 120 times as much glycerine, 40 times as much flavoring oils and aromatics, and 60 times as much lime juice.

Even the taste of the bitter caffeine which is present in 420 times as great a quantity as the tannin does not affect the taste of the syrup.

DR. J. J. KESSLER:

"Caffeine has a bitter taste, and has a stronger taste than the solid matter in 'Merchandise No. 5'. (Rec. 2478).***There is very many more times of caffeine in 'Coca-Cola' syrup than there is of tannin. Now caffeine and tannin both taste something alike,—both taste something like quinine,—but *you can't taste the caffeine in 'Coca-Cola' syrup and you can't taste the tannin.*" (Rec. 2491).

DR. H. C. FULLER:

"Yes, sir, caffeine has a taste; it is bitter. I don't know whether or not it adds any taste to a drink of this sort. I doubt it. *I don't think it affects the*

taste one way or the other, nor do I think it would modify the taste. If a drink which was made up in exactly the same way that 'Coca-Cola' is made, with all the other ingredients in it, and had caffeine in it in the proportion that it is in 'Coca-Cola' syrup, (w)as compared with a drink made up identically the same way, *and,* (but) without any caffeine in it at all, I don't think there would be any difference between the two samples in taste." (Rec. 2354).

Again, take the caramel. There is 120 times as much caramel in plaintiff's syrup as there is tannin supplied by "Merchandise No. 5", and caramel is a real flavoring material; yet the caramel in plaintiff's product has no appreciable effect whatever on its taste or flavor.

DR. WILLIAM M. SIMONSON:

"Caramel has a characteristic flavor. It is used as a flavoring agent, I understand, in making confectionery.***" (Rec. 2506).

DR. J. J. KESSLER:

"Caramel coloring has a flavor***but it is used primarily for the purpose of coloring, of course." (Rec. 2501).

DR. CHARLES E. CASPARI:

"The color of 'Coca-Cola' is produced by caramel, which is commonly known as burnt sugar, obtained by heating sugar to a certain degree of temperature when the change known as caramelization takes place converting the sugar into caramel. The caramel in 'Coca-Cola' merely colors it. It has no other function whatever." (Rec. 902).

DR. JOHN A. WESENER:

"I think the only function which caramel performs in 'Coca-Cola' syrup is to give it its color." (Rec. 923).

DR. WILLIAM P. HEATH, of the Pratt Laboratory, Atlanta, (plaintiff's witness):

"The coloring I speak of is caramel,—really burnt sugar. Yes, sir, that coloring is used in 'Coca-Cola' to give it its characteristic color. No. sir, it does not serve any other purpose in 'Coca-Cola', except to give it its color.***Caramel has a taste, by itself, *—it has a taste,—but that taste is completely destroyed when it is put into 'Coca-Cola' syrup.****** I have tried it with and without the caramel, and I didn't notice any difference." (Rec. 415).

SAMUEL C. DOBBS:

"The color of 'Coca-Cola' is a caramel color, or about the color of port wine.***That color is produced by the addition of burnt sugar, which is used for coloring and for no other purpose whatever. (Rec. 319).***I know that they do not put caramel in there for any other purpose than just to color the drink, because the Coca-Cola Company has been making it and I know that caramel has no effect upon the taste. We have experimented by making it with and without the caramel, too. It has been done here in our laboratory in my presence and under my observation. *No, I do not say that caramel has no taste, at all.; I say that caramel in 'Coca-Cola' has no effect upon the taste.* Caramel in its concentrated form has a rather bitterish, acrid taste." (Rec. 325).

If this were not enough to thoroughly expose the absence of any foundation for plaintiff's experts' efforts

to make it appear that this tannin is a desirable property in plaintiff's syrup, and that it is designedly put in there for the effect it has upon the flavor, then the finishing touches are administered by plaintiff's recent advertising pamphlet entitled, "The Truth About Coca-Cola", which is in evidence as *plaintiff's exhibit* 92. In this, plaintiff unequivocally states:

> "This is a book of information—not of defense. We are putting this book into your hands with the simple purpose of telling you just exactly what 'Coca-Cola' is what its physiological action is, what it is made of. *** What are the 'effects' of 'Coca-Cola' physiologically? Outside of its perfect deliciousness and palate pleasing qualities, what does it do? The answer is perfectly simple. It has just exactly the same result as a cup of tea or coffee, except that *'Coca-Cola' contains no tannic acid, like tea.* No empyreumatic oils, like coffee. Very often tea gives indigestion. *That's the tannin in it. Tannin does nothing more or less than tan (turn into leather) the albuminous foods in your stomach.* Leather is a mighty hard thing to digest. Therefore the indigestion. *** Now here is 'Coca-Cola', containing the good feature of tea and coffee,—the caffeine,—yet *without the tannic acid* of the tea and the deleterious oils of the coffee.***Tea, coffee, and 'Coca-Cola' relieve headache by refreshing the nerves and not by deadening them. In relieving headache, 'Coca-Cola' is superior to tea or coffee, not because it contains more caffeine, for it only contains one-third to one-half as much, but because 'Coca-Cola' is free from tannic acid." (Plaintiff's Exhibit 92, pp. 1, 6, 8, 9 and 16).

On pages 4 and 5 of this booklet is displayed a copy of a letter from J. C. Peacock to the Coca-Cola Co., dated Philadelphia, Oct. 12th, 1907, in which Dr. Peacock reports the results of a "very careful analysis of 'Coca-Cola'," in part as follows:

"A glass of 'Coca-Cola' contains one and one-quarter grains of caffeine; a cup of fair quality tea or coffee contains just as much of this substance, and the better the quality of coffee and tea the more caffeine it is likely to contain. There are *tannic substances in tea and coffee which are more or less disturbing to the digestive functions. These objectionable substances are not present in 'Coca-Cola'.*"

No wonder, then, that Dr. Kessler concluded, from his analysis of "Merchandise No. 5" and of "Coca-Cola" syrup, that:

"The presence of whatever there is in 'Coca-Cola' syrup, in the quantity it is, from the coca leaf, would have *no appreciable effect one way or the other upon the taste, flavor, or aroma of the beverage. In my opinion, it would have absolutely one. The same is true of the cola nut.* Rec., 2490-2491). * * * Q. Doctor, what conclusion did you draw, as the result of your analysis of 'Coca-Cola' syrup and the quantity of whatever extract there may be there from the coca leaf and the cola nut,—what conclusion from that did you draw as to the value of the presence of this 'Merchandise No. 5' in 'Coca-Cola' syrup, if any? A. I can't see that it has any value whatsoever. In my opinion it has no value whatever, either from a flavoring or a condiment standpoint, nor does it serve the purpose of adding anything to any extent whatever which could have any purpose or effect,—I don't say purpose, but which could have any effect." (Rec., 2491-2).

Of course it has a purpose,—to lend a weak support to the fraudulent pretense that plaintiff's product is what it is not.

PLAINTIFF'S USE OF THE WORDS "COCA-COLA" CALCULATED TO DECEIVE PURCHASERS.

In *Colgan v. Danheiser, et al.*, 35 Fed., 150, Judge Gresham held the name "Taffy Tolu" to be descriptive of two ingredients of a chewing gum; in *Clotworthy v. Schepp*, 42 Fed., 62, Judge Lacombe held "Rose Vanilla" to be descriptive of two well known substances, and in *British-American Tobacco, Ltd. v. British-American Cigar Stores*, 206 Fed., 189, Judge Ward held "British-American" to be geographically descriptive. In *United States v. The Coca-Cola Company, supra*, Mr. Justice Hughes, said:

> It is said that "coca" indicates one article and "cola" another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument, it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as "Chocolate-Vanilla", although it was destitute of either or both, provided the combined name had not been previously used. We think the contention misses the point of the proviso. A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients are not primarily distinctive names save as they appropriately describe the compound with such ingredients. *To call the compound by a name descriptive of ingredients which are not present is not to give 'its own distinctive name'—which distinguishes it from other compounds—but to give it the name of a*

different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

In the present case, we are of the opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. *Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists that its product contains both.*

The evidence in this case accords exactly with the reasoning in the decisions referred to.

"Coca" was originally used to designate the extract of coca leaves and not a solution containing tannin with a possible trace of chlorophyll. "Cola" was originally used to designate the extract of cola nuts and not an extract of caffeine from tea leaves with possibly a mere trace of cola therein.

The pubic would naturally expect each of these words to have their ordinary meaning which corresponds exactly with the meaning they were originally used to convey.

F. M. ROBINSON, for 22 years secretary of The Coca-Cola Company, (plaintiff's witness):

> "I was the originator of the word. The syrup was given this name on account of the extracts which it contained, 'coca' and 'cola', made from coca leaves and cola nuts." (Rec., 354).

DAVE S. BAUER, a retail druggist of Mobile, Alabama, who has been in the business a quarter of a century, (plaintiff's witness):

> "I have always understood 'Coca-Cola' was a syrup made with some coca leaves and from cola nuts, and I still understand it that way. I understand that *from the name of the product*, and from information I get in the drug business. I was in the drug business when 'Pemberton's Wine of Coca' was put out years ago, and I was informed that they sold their formula to other parties and that they then manufactured a syrup,—when 'Pemberton's Wine of Coca' was sold,—as an *extract of coca leaves*. * * * No, sir, I did not get my understanding as to the ingredients of 'Coca-Cola' from Pemberton; I suppose I got it from Pemberton's salesmen when I was a boy, and *from the name 'Coca-Cola'*." (Rec., 540-1).

T. J. HAZLIP, of Fort Worth, Texas, a retail druggist since 1893, (plaintiff's witness):

> "Oh, yes, when I heard this drink called 'Coca-Cola' that name conveyed to my mind the idea that the drink had coca in it—coca leaves. Yes, sir, as a druggist I also knew that cocaine came from coca leaves." (Rec., 1961).

S. B. CHRISTY, a bottler, of Murfreesboro, Tennessee, (plaintiff's witness):

> "If I heard a drink called lemon-orange, that name would convey to me the idea of a drink made from the essence of lemon and orange. Q. Well, what idea does this word 'Coca-Cola' convey to your mind? A. Made from coca leaves and cola nuts, I reckon." (Rec., 2031).

JOHN H. BOHNE, an employee of the Liquid Car-

bonic Co., of St. Louis, a large jobber of "Coca-Cola" (plaintiff's witness):

> "If I heard a drink called 'Lemon-Orange' I would think its principal ingredients were lemon and orange. If I heard it called 'Orange-Cola', I would think it would contain those things,—orange and cola. If I heard a drink called 'Coca-Cola', I would think that it contained coca and cola." (Rec., 2046).

CLAUDE W. HICKLE, a drug clerk, of Charleston, W. Va., (plaintiff's witness):

> "Yes, sir, I know what coca leaf is. I have heard of it a great deal, we use it quite often in the drug store. * * * When I hear this drink called 'Coca-Cola' I suppose it has to have coca leaves in it. * * * If I heard a drink called 'Lemon Orange' I would imagine that it would be composed of a combination of lemon and orange." (Rec., 2064).

DR. WILLIAM M. SIMONSON, of Cincinnati:

> *"From hearing the name 'Coca-Cola', I would expect that the product would carry both the ingredients named, namely, coca and cola.* (Rec., 2510-11). * * * I would expect it to contain the *proximate principles of the coca* and likewise of the cola nut, that would be soluble in a liquid of that character. The characterizing ingredient of the coca leaf would be the alkaloids. I expected to find, from the leaves such as would be soluble in a liquid of this kind and character. Cocaine or its associated alkaloids would be soluble in a liquid of this character,—that is, 'Coca-Cola' syrup." (Rec., 2518).

PLAINTIFF'S SIGNIFICANT CLAIM TO THE EXCLUSIVE RIGHT TO THE SLANG NAME FOR COCAINE.

While plaintiff strenuously contends herein that its drink is free from cocaine or other narcotic drug, it is significant that this suit is based directly upon a claim to the exclusive right to the slang name for cocaine[10] and the slang name for the class of narcotic drugs of which cocaine is perhaps the best known[11]. It piously disclaims the use of real coca with its narcotic alkaloid but strenuously insists that it has the right to trade upon and profit from, the general belief that Coca-Cola does in fact, contain cocaine. Its voice is the voice of Jacob but its hand is the hand of Esaw.

DR. J. D. T. LAWRENCE, a retail druggist for ten years, Atlanta, (plaintiff's witness):

> " 'Dope' ordinarily would mean some sort of narcotic, sort of like cocaine,—something on that order,—that would be the real impression it would give you, you know." (Rec., 472).

C. G. PETERS, a retail druggist for twenty-eight years, New Orleans, Louisiana, (plaintiff's witness):

> "It (Dope) means morphine, cocaine, something like that,—anything of which the drug forms a

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[10] **"coke** (2)**n.** (Slang, Southern U. S.) Cocaine".—**Funk & Wagnall's New Standard Dictionary** (Eds. of 1913 and 1916) p. 523.

[11] **"dope"** v. t. (Slang I. 1.) To stupefy or exhilarate as by a drug. *** **dope, n.** 3. (Am. Slang). By extension, any narcotic drug, as morphine. *** **dope fiend.** A habitual user of a narcotic drug." **Funk & Wagnall's New Standard Dictionary.** (Eds. 1913-1916). p. 749.

"dope". n. 5.—Any drug, such as opium, laudanum, morphine, **cocaine**, hydrate of chloral, hashish, etc., which has the property of inducing sleep or stupefying; a narcotic. *** Slang. II. **intrans.**—To indulge habitually in the use of opium or other drugs, either for the pleasurable sensations produced, or as anaesthetics.—Slang.—**Century Dictionary & Cyclopedia,** New Volume (XI) p. 389. (The Century Company, New York, 1909).

part. You say you suppose it's true with me, as was the general impression up to a very recent time, that 'Coca-Cola' had something of that kind in it; well as a druggist, I think it did have something in it, and that was pretty generally known, too, and I suppose it was known to my customers." (Rec., 654-5).

JACOB SCHRODT, a retail druggist for twenty-one years, Dallas, Texas, (plaintiff's witness):

"* * * 'Dope' not only means things of that kind, but things that have a tendency to 'dope' you, or to stupefy you, or exhilarate you, or anything else that is injurious, such as cocaine,—'give me a shot of cocaine',—they might mean that if they thought I was selling that, so I want to make myself right. Yes, sir, 'shot-in-the-arm' is based on either cocaine or morphine, same proposition,—that's a frequent expression. * * * Yes, sir, *they use that name interchangeably with cocaine.* * * *" Rec., 745).

EDWARD T. LANGAN, a lunch-room proprietor, but who was formerly a soda dispenser, Chicago, Illinois, (plaintiff's witness):

"I have heard customers using such expressions as 'shot-in-the-arm', 'eye-opener',—and Oh, various names. * * * Yes, I do know that cocaine, or morphine, is taken that way, by an injection in the arm. That form of expression is equivalent to asking for some drug, and the same way with 'dope'. When they come in there and say, 'Give me a "dope" ', that is practically asking for a drug, a drug drink." (Rec., 898).

PHILIP JANSEN, an "investigator" employed by Messrs. Reed & Rogers, attorneys for plaintiff, to make certain "investigations" in Chicago:

> "Yes, sir, in one of the places where I went on my rounds, I asked the proprietor, or the man there, for a 'coke', and he asked me if I would have it in a glass or in the arm. * * * These people I went to see were people who dealt in 'Coca-Cola'. * * * I remember one dealer who said that his customers used to think that it had cocaine in it. At times they ask for it as 'cocaine' and 'morphine'." (Rec., 964-965).

MAX BLOOMSTEIN, a retail druggist for thirty years, Nashville, Tennessee:

> "I cannot say just exactly where the slang 'koke' and 'dope' originated. I presume it originated because it just had the same effect. I have heard the word 'dope' as applied to cocaine, to morphine, and heroin, before I ever heard it applied to a drink, quite a number of years ago. * * *" (Rec., 1146).

T. J. HAIZLIP, of Fort Worth, Texas, a retail druggist since 1893, (plaintiff's witness):

> "Whenever a man came to my fountain and said 'coke', I inferred that he meant 'Coca-Cola' because it was said,—I don't know whether it is true,—that it has cocaine in it." (Rec., 1960-1).

J. M. PENLAND, a wholesale druggist of Waco, Texas, formerly a retail druggist, (plaintiff's witness):

> "I have considered the word 'dope' with reference to drugs and narcotics, and in that respect it means morphine or cocaine, usually, or gum opium, or anything that is used as a narcotic by fiends. To me the (word) 'coke' has a similar meaning, because *they use it instead of 'cocaine'*." (Rec., 1980)

The spectacle of the plaintiff's contending herein that the use of "Coca" in its name and the picture of coca

leaves on its labels is not calculated to induce the belief that the narcotic alkaloid of coca is present in its drink and that such belief does not exist, while strenuously insisting that it has the exclusive monopoly on the use of all slang names descriptive of cocaine, applied to a soft drink, is certainly not a pleasing one.

THE NATURAL BELIEF THAT THE ALKALOID OF COCA IS PRESENT IN COCA-COLA HAS BEEN AND STILL IS WIDESPREAD.

G. J. MARTIN, a traveling salesman for the Coca-Cola Company, (plaintiff's witness):

> "Yes, I heard the rumor that went around that 'Coca-Cola', the product manufactured by The Coca-Cola Company of Atlanta, Georgia, contained cocaine. * * * Yes, I have run across people who thought it contained cocaine." (Rec., 341).

DR. J. D. T. LAWRENCE, a soda foundtain proprietor, (plaintiff's witness):

> "Yes, sir, I have run across people who thought that 'Coca-Cola' had cocaine in it." (Rec., 472).

GUY HENDERSON UPCHURCH, a retail druggist for fifteen years, Mobile, Alabama, (plaintiff's witness):

> "No, I do not claim ignorance of the fact that for many years, it was generally supposed that 'Coca-Cola' had cocaine in it,—a great deal of the public suppose that now, so far as that part of it is concerned. * * * I frequently have the argument that it contains such things. * * * I have asked a good many as to what they thought it contained,

and they argued with me that they thought it contained those things." (Rec., 530-31).

DAVE S. BAUER, a retail druggist for twenty-five years, Mobile, Alabama, (plaintiff's witness):

"I have heard people say that 'Coca-Cola' contains cocaine. * * * I have heard a good many people who have always contended that it had cocaine in it, or some extract of cocaine. That was the general impression for years and years. * * * The name 'coke' implies coca, and cocaine is derived from coca leaves." (Rec., 539-40).

GEORGE L. SEIBERT, soda dispenser, Mobile, Alabama, (plaintiff's witness):

"Anyone taking cocaine, you call that 'dope', and it means a drug on the order of cocaine,—that's the only way I have heard of it,—a drink something on the order of 'Coca-Cola'. * * * Some of the rank and file of people generally believe there is cocaine in 'Coca-Cola'." (Rec., 553-4).

JOHN W. GRAHAM, soda dispenser, Mobile, Alabama, (plaintiff's witness):

"They gave me the impression, when they asked for 'dope' or 'a shot' that they were asking for a drink that was the equivalent of 'dope' or a 'shot', and to a certain extent it made me think of what I have often heard, that 'Coca-Cola' has cocaine in it. I can't say that that is the impression of most of those who drink 'Coca-Cola'; some think it, some not. I have talked to some, and they believe they are getting a little cocaine in their drink when they get it." (Rec., 557).

GEORGE S. MORSE, buyer for the Economy Drug Store, New Orleans, (plaintiff's witness):

"It was once the general impression that 'Coca-Cola' had some stimulating drug in it, and I always thought it myself until I read the report of the Government that it did not contain it. I think it was in the past six months, if I remember right, that I read it. Yes, sir, it is the general impression of our customers that it does contain a stimulant of the kind that has been suggested,—cocaine, or morphine, or something like that." (Rec., 646-7).

CECIL V. ROGERS, a retail druggist for twenty-four years, Dallas, Texas, (plaintiff's witness):

"I have had lots of people come into my store, ladies and men, and take a 'Coca-Cola' and claim that it was always relieving fatigue and tired feeling. * * * I don't know whether it was the general impression or not, but I have heard it said that they thought it contained traces of cocaine. If I get the use of cocaine right, it has an exhilarating effect,—it does exhilarate your nerves." (Rec., 739).

F. L. SKILLEN, a retail druggist, Dallas, Texas, (plaintiff's witness):

"I hardly ever speak of 'Coca-Cola' unless somebody asks me do I think 'Coca-Cola' hurts them, or something of that kind. I have had such inquiries, yes. I have had them to ask me if there was cocaine or 'dope' in it, as they call it. * * *" (Rec., 796-7).

A. W. STANLEY, proprietor of a hotel and bar, Chattanooga, Tennessee:

"If they ask me to give them a shot of cocaine, 'Coca-Cola' is, I suppose, what they want. A great many people think 'Coca-Cola' has cocaine in it, you know." (Rec., 1005).

DR. J. G. PYLE, a druggist, (plaintiff's witness):

> "There used to be a lot of talk about cocaine in Coca-Cola and people used to ask if it had cocaine in it, and that stuff." (Rec., 1726).

T. J. HAZLIP, a druggist since 1893, (plaintiff's witness):

> * * *but we all know they have accused "Coca-Cola" of being doped and when we apply "dope", we think of cocaine and morphine,—opiates, things of that kind,—that's my idea of it. Oh, yes, when I heard this drink called "Coca-Cola" that name conveyed to my mind the idea that the drink had coca in it—coca leaves. (Rec., 1961).

PLAINTIFF RECOGNIZED THAT THE PUBLIC WAS DECEIVED.

It was to the widespread deception of the public as to the ingredients of Coca-Cola that plaintiff referred to in "The Truth About Coca-Cola", when it printed the following:

> "By many it has been inferred, *presumably from the name*, that "Coca-Cola" is made from the drugs coca and cola and *must, therefore, contain the dangerous substance cocaine.* This, however, is not true for "Coca-Cola" does not contain cocaine or any of its derivatives."
>
> "Ignorance of the true properties of "Coca-Cola" has caused some people to deny themselves a beverage that they like, and that is not only wholesome but physically beneficial. * * * You have heard people argue that "Coca-Cola" must contain morphine, whiskey, or some other injurious drug, because it relieves headache. Well, there are more ways of relieving tired, weary nerves than by be-

> numbing them with cocaine, morphine, bromide, whiskey, or coal-tar remedies. Tea, coffee, and "Coca-Cola" relieve headache by refreshing the nerves and not by deadening them. * * * There is no necessity to argue, guess or conjecture what "Coca-Cola" contains, or does not contain. It has been analyzed by chemists of the national, city and State Governments, as well as by the professors of chemistry in the leading universities, colleges and polytechnic schools. They all find that it does not contain cocaine, whiskey, morphine, opium, bromide, or any narcotic drug." *(Plaintiff's Exhibit 92).*

Doubtless it was because of the popular impression that plaintiff's product is still "made from the drugs coca and cola", and must, therefore, still "contain the dangerous substance cocaine", and must still be a habit-forming drink, just as it was originally, that plaintiff felt called upon to issue the following panygeric on "Habit" in "The Truth About Coca-Cola":

> "Habit.—Good habits are more easily acquired than bad ones. Nature herself leads us into good habits, like the bread and butter habit, the water habit, the sleeping habit,—habits that come from a physical necessity. Nature makes habits that are good. She calls for bread and butter. We get the bread and butter habit. She calls for sweets, we get the sugar and candy habit. What does habit amount to? Not a single solitary thing. * * * Now let us repeat so that you will see plainly just exactly what habit is and the part that nature plays in it. Nature calls for bread and butter, and we get the bread and butter habit; she calls for sweets, and we get the sugar and candy habit; she calls for something to aid her in her fight against overcharged nerves, and we get what is called the 'Coca-Cola Habit', because that gives the sweetness, the nerve-quieting qualities, etc. * * * You must get rid of

the impression, because a thing is popular it is anything but wholesome. But leave off drinking 'Coca-Cola' any time you've a mind to. You will have no craving for it. You may miss its deliciousness as you miss your hot biscuits in the morning; but you won't feel any other discomfort. You can't, because caffeine does not create the 'drug habit'. * * * If liking 'Coca-Cola', then, is a habit, think of the thousands upon thousands suffering with like habits,—candy fiends,—butter-milk drunkards,—slaves to water. When any one talks to you about the 'Coca-Cola Habit', laugh at him. * * * If you will consider this seriously, and read and read again our opening paragraph, you will find that this answers absolutely and without equivocation any and all questions as to 'Coca-Cola' containing any deleterious, injurious, or habit-forming drugs. Read the above again,—it is your assurance of the healthfulness of 'Coca-Cola'. No one can get around it." *(Plaintiff's Exhibit 92).*

PLAINTIFF'S ATTEMPT TO CORRECT THE FALSE IMPRESSION PRODUCED BY ITS NAME AND LABELS.

If it be insisted that, by the issuance of this pamphlet and others to the same effect, plaintiff has done all in its power to off-set the false impression created by the name "Coca-Cola", and the pictures of coca leaves and cola nuts, the defendants reply is that "it had no right to do that which rendered such explanations necessary, and which also rendered them futile."

The California Fig Syrup Company made far reaching attempts to correct the false impression produced by its use of the name "Syrup of Figs", but this Court held that such action did not relieve it from the charge of deceit and misrepresentations to the public.

Worden v. California Fig Syrup Co., 183 U. S., 517; 47 L. Ed., 282; (Mr. Justice Shiras):

> "That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars that the medical properties of their compound were derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public. * * * *The company, by the use of the terms of its so-called trade-mark on its bottles, wrappers, and cartons, continued to appeal to the consumers out of whose credulity came the profits of their business.*"

GROUNDS OF DISTRICT COURT'S ACTION.

In passing upon the question of unclean hands the District Court was controlled by the decision in *Nashville Syrup Co. v. Coca-Cola*, 215 Fed., 527, ("C. C. A."-6), and perhaps, also by the companion case of *U. S. v. 40 Barrels and 20 Kegs of "Coca-Cola"*, 215 Fed., 535, ("C. C. A."-6) decided at the same time. In his opinion, Judge Sawtelle said:

> "It is also contended in the answer that the name 'Coca-Cola' was deceptive as a trade-mark, and for that reason was fraudulent, and was but a descriptive name of a product which the plaintiff does not now produce. (Rec., 231) * * * It is insisted by the defendants that the words 'Coca-Cola' are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trade-mark. This contention was considered in case of *Coca-Cola Co. v. Nashville Syrup Co.*, 215 Fed., 527, and was decided adversely to such contention. I think that the decision is decisive of the question." (Rec., 237-8).

That case was tried on final hearing in the court below, and in the Circuit Court of Appeals, simply upon the affidavits submitted on a previous application for a preliminary injunction. (200 Fed., 157). The case was decided on the same reasoning as in *U. S. v. Forty Barrels, etc., supra,* and the decision in the latter case was overruled by this Court. (241 U. S., 265; 60 L. Ed., 995).

PLAINTIFF'S GRATUITOUS PROOFS THAT IT MISREPRESENTS ITS PRODUCT TO THE PUBLIC.

The plaintiff has sought to prove in this case that it has a right to use "Coca" in the name of its drink because the tannin derived from spent coca leaves and sawdust would or might affect the taste or flavor of its drink, *but one of its principal recommendations of its drink to the public is that it contains no tannin.*

The testimony of plaintiff's chief chemist and the representation of its Ad. writer as to tannin are here shown in double column for the purpose of comparison.

Dr. H. C. Fuller:

"Tannin has flavoring properties; it might be termed a flavoring agent. It certainly adds to the blend of this product in a very pleasing way. (Rec., 2354).

The only thing obtained from the coca leaf and which is present in this

The Truth About Coca-Cola.

"*** Coca-Cola contains no tannic acid, like tea. No empyreumatic oils like coffee. Very often tea gives indigestion. That's the tannin in it. Tannin does nothing more nor less than tan (turn into leather) the albuminous foods in your

extract * * * that really has got a flavor or that really tends to flavor anything in which it is put would be the tannin. (Rec., 2358-9).

There is a flavor of coca leaf in 'Merchandise No. 5' —a flavor due to the tannin. (Rec., 2369).

You ask if I would say or not, that the tannins from the coca leaves act in making up a part of the blend that goes to make up the full flavor of Coca-Cola; they do. (Rec. 2401).

stomach. *** Now here is Coca-Cola containing the good features of tea and coffee—the caffeine—yet without the tannic acid of the tea and the deleterious oils of the coffee. *** Coca-Cola is free from tannic acid.

There are tannic substances in tea and coffee which are more or less disturbing to the digestive functions. These objectionable substances are not present in Coca-Cola. (Plaintiff's Exhibit 92, pp. 1, 4, 5, 6, 8, 9, and 16).

As between two frauds, the plaintiff elected to admit in its proofs that its statements to the public that there is no tannin in Coca-Cola are false, thereby on its own eagerly presented showing, establishing that it has no right to invoke the aid of a court of equity. But, even by this admission that it is guilty of one fraud on the public, it does not improve its position with respect to the other. The name of plaintiff's drink is still "Coca-Cola", and not "Tannin-Cola", so that its testimony that tannin is, in fact, present with its tannin flavor, could neither excuse nor justify its use of "Coca" in its name since tannin, *even if it gave the entire flavor to Coca-Cola*, is not coca nor even a substance likely to be acceptable to the public as a substitute for coca if its presence were openly admitted instead of being solemnly denied.

PLAINTIFF'S PRODUCT MISBRANDED.

Section 8 of the Food & Drugs Act of June 30th, 1906, (Chap. 3915, 34 Stat. L., 769, 1909 Supp. Stat. Ann., 139-140) provides:

> "The term 'misbranded' as used herein shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. * * * That for the purposes of this Act an article shall also be deemed to be misbranded. * * * In the case of food: First, if it be an imitation of, or offered for sale under the distinctive name of another article. Second, if it be labeled or branded so as to mislead or deceive the purchaser. * * * Fourth, if the package containing it, or its label shall bear *any statement, design, or device regarding the ingredients, or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.*"

In *U. S. v. 40 Barrels and 20 Kegs of "Coca-Cola"*, 241 U. S., 265; 60 L. Ed., 995, 1004, the Supreme Court said, with respect to a charge of misbranding brought by the Government against plaintiff's product (Mr. Justice Hughes):

> *"Second.*—As to *'misbranding'*. In the second count it was charged that the expression 'Coca-Cola' represented the presence in the product of the substances coca and cola, and that it contained 'no coca and little if any cola'. So far as 'cola' was concerned, the charge was vague and indefinite, and this seems to have been conceded by the Government at the beginning of the trial. With respect to 'coca' there was evidence on the part of the Govern-

ment tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called 'Merhandise No. 5' (one of the ingredients) was obtained from both coca leaves and cola nuts. It was assumed on the motion for a peremptory instruction that there might be a disputed question of fact as to whether the use of the word 'coca' is to be regarded 'intrinsically and originally' as stating or suggesting the presence of 'some material element or quality' derived from coca leaves, and it was also assumed that the evidence might be deemed to be conflicting with respect to the question whether the product actually contained anything so derived. *191 Fed., 438.* But these issues of fact were not considered to be material. On this branch of the case, the claimant succeeded upon the ground that its article was within the protection of the proviso in Section 8 as to one known 'under its own distinctive name'." 132 C. C. A., 47, 215 Fed., 544.

"Section 8, in its 4th specification as to 'food', provides that the article shall be deemed to be 'misbranded' if the package containing it, or its label, shall bear any statement, design, or device regarding the ingredients or substances contained therein, which shall be false or misleading in any particular.' Then follows the proviso in question that an article not containing any added poisonous or deleterious ingredients 'shall not be deemed to be * * * misbranded' in the case of 'mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article', if the name is accompanied with a statement of the place where the article has been produced."

"A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given

kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either 'misleading' or 'false' as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale 'under the distinctive name of another article'. Thus, that which is not coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called 'X's Coffee.' Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of 'Y's Lemon Extract'. The name so used is not 'distinctive', as it does not appropriately distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to 'mixtures or compounds', we think that the term 'another article', in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a 'distinctive name.'

"A 'distinctive name' may also, of course, be purely arbitrary or fanciful, and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.

"If, in the present case, the article had been named 'Coca', and it were found that the name was actually descriptive in the sense that it fairly implied that the article was derived from the leaves of the coca plant, it could not be said that this was 'its own distinctive name' if in fact it contained nothing so derived. The name, if thus descriptive, would import a different product from the one to which it was actually affixed. And, in the case supposed, the name would not become the 'distinctive

name' of a product without any coca ingredient unless in popular acceptation it came to be regarded as identifying a product known to be of that character. It would follow that the mere sale of the product under the name 'Coca' and the fact that this was used as a trade designation of the product, would not suffice to show that it had ceased to have its original significance if it did not appear that it had become known to the public that the article contained nothing derived from coca. Until such knowledge could be attributed to the public, the name would naturally continue to be descriptive in the *original* sense. Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists; for, if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation. The same conclusion would be reached, if the single name 'Cola' had been used as the name of the product, and it were found that in fact the name imported that the product was obtained from the cola nut. The name would not be the distinctive name of a product not so derived until in usage it achieved that secondary significance.

"We are thus brought to the question whether, if the names coca and cola were respectively descriptive, as the government contends, a combination of the two names constituted a 'distinctive name' within the protection of the proviso in case either of the described ingredients was absent. It is said that 'coca' indicates one article, and 'cola' another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument, it would permit a manufacturer, who could not use

the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as 'Chocolate-Vanilla', although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point of the proviso. A mixture of compound may have a name descriptive of its ingredients, or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients, are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it 'its own distinctive name',—which distinguishes it from other compounds,—but it gives it the name of a different compound. That, in our judgment, is not protected by the proviso unless the name had achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

"In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of the evidence with respect to the presence of any coca ingredient. We conclude that the court erred in directing a verdict on the second count. The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion."

The facts discussed in the preceding sections clearly bring plaintiff's product within this decision.

PLAINTIFF'S PRODUCT ADULTERATED.

Section 7 of the Food and Drug Act provides:

> "That for the purposes of this Act an article shall be deemed to be adulterated: * * * In the case of food: * * * Third.—If any valuable constituent of the article has been wholly or in part abstracted."

That the tonic and nerve stimulant properties of the drug coca have been abstracted from plaintiff's product, has been shown. That such properties of coca represented a valuable constituent of the article as made originally, cannot be denied[12]. One of the leading inducements to its purchase was the representation that it contained the valuable "tonic and nerve stimulant properties of the wonderful coca plant." Its efficacy as a tonic and stimulant was very largely dependent upon cocaine. The public still believes the drug is present in the preparation, and buys it under that belief. Its abstraction, therefore, would seem to be clearly an adulteration.

So far as the drug cola is concerned, if it ever was present, then it has certainly been abstracted, for it is not present now in any appreciable amount, if present at all, as already shown. Plaintiff cannot deny that, if ever present, it was a valuable constituent because its product was advertised as possessing special merit on account of the fact that it contained the "tonic properties of the famous cola nut."

[12]**The chief value of coca consists in the alkaloid cocaine.** NELSON'S ENCYCLOPOEDIA, Perpetual Loose Leaf Edition. (Thomas Nelson & Sons, New York), Vol. 3, p. 211.

In considering whether cocaine was a valuable constituent of Coca-Cola and its later abstraction an adulteration, the understanding of the consuming public as to the ingredients of Coca-Cola and its physiological effect is entitled to consideration. That the belief that Coca-Cola contains cocaine is widespread is established. In removing the active principle of coca from its beverage, plaintiff abstracted *what the public certainly believed to be present and presumbably believed to be valuable.* This presumption is believed to be conclusive in the absence of any proof to the contrary, from plaintiff's recent representation to the public that Coca-Cola, "outside of its perfect deliciousness and palate-pleasing qualities",—that is to say, its merits as a food—"relieves headache by refreshing the nerves" ("The Truth About Coca-Cola", *Plaintiff's Exhibit 92)* and from the fact that the public regards Coca-Cola as having, in addition to its food qualities, a stimulant and medicinal quality characteristic of real coca.

DAVID G. WISE, a retail druggist, Atlanta, (plaintiff's witness):

> "Yes, sir, I know why the name 'dope' is used,—I surmise, I don't know, but I presume it was given it because of the medicinal effect, or the talk way back when it was first manufactured,—some medicinal effect in it." (Rec., 475).

I. V. WOOD, retail druggist, Mobile, Alabama, (plaintiff's witness):

> "The idea (of using the word 'dope') originated, I suppose, from the conception that he wanted a dope of some sort,—that is, that it had something in it that stimulated or attracted a man and made him come again." (Rec., 571).

GEORGE S. MORSE, buyer for the Economy Drug Store, New Orelans, (plaintiff's witness):

> "It was once the general impression that 'Coca-Cola' had some stimulating drug in it, and I always thought it myself until I read the report of the Government that it did not contain it. I think it was in the past six months, if I remember right, that I read it." (Rec., 646-7).

CECIL V. ROGERS, a retail druggist for twenty-four years, Dallas, Texas, (plaintiff's witness):

> "I have had lots of people come into my store, ladies and men, and take a 'Coca-Cola' and claim that it was always relieving fatigue and tired feeling." (Rec., 739-40).

JACOB SCHRODT, a retail druggist for twenty-one years, Dallas, Texas, (plaintiff's witness):

> "At least five or six or seven years ago people called it 'dope' because some of them had an idea that 'Coca-Cola' contained stuff that would make them dopey, and even to this day some of them think so,—nevertheless, it has been proven that it doesn't." (Rec., 742).

D. R. KEYSER, a retail druggist for nine years, Dallas, Texas, (plaintiff's witness):

> "I haven't any idea why they should call it 'dope', or a' shot-in-the-arm', unless it is on account of the stimulating effect,—that's the only reason I have why they should call it that." (Rec., 810).

MAX BLOOMSTEIN, a retail druggist for thirty-years, Nashville, Tennessee:

> "I cannot say just exactly where that slang 'koke'

and 'dope' originated. I presume it originated because it just had the same effect. I have heard the word 'dope' as applied to cocaine, to morphine, and heroin, before I ever heard it applied to a drink, quite a number of years ago. * * * 'Dope' seems to me to be something that stimulates, or makes you feel a little better, or a little different from what you ordinarily did." (Rec., 1146).

W. J. FINNIN, a retail liquor dealer:

"I will tell you what I did hear when I was selling Coca-Cola, I said to one of my customers I wonder how the dickens he liked so damn much of that stuff all day long; he said, 'It has got good dope in it; it makes me feel good, revives me, I feel like sometimes I could go out and spend one hundred dollars when I have only five cents in my pocket.' I said I have wondered all the time why you drink this stuff. 'Gee', he says, 'it puts me on the jump; all I have got now is what you gave me in change, twenty cents out of a quarter, and I feel like I have got one hundred dollars'." (Rec., 1564).

PLAINTIFF CANNOT CLAIM A LOCUS PENITENTIAE.

Plaintiff asks to be afforded a *locus penitentiae*, but upon a very bad record of past and present conduct. After having built up a big business in the sale of a cocaine containing drink, it took out the cocaine *but did not change the name of the drink*. Now, whatever might have been the name used, the public would naturally suppose from the continued use of the same name that it was getting the same cocaine containing drink it had always bought, and the evidence shows that this condition exists today. This deception could and can be prevented only by adopting and using a new name on the changed (cocaine free) product. Furthermore, the

plaintiff not only uses the same name but such name obviously conveys in the word "Coca" the inherent suggestion that the same active principle of coca, formerly present, is in fact, still present. It acknowledges, by the matter adopted and printed in its recent advertising circular (Plaintiff's Exhibit 92) that "By many it has been inferred, presumably from the name, that 'Coca-Cola' is made from the drugs coca and cola and must, therefore, contain the dangerous substance cocaine", but it asks this Court not only to sanction the continued use of this admittedly deceptive name but to go further and give it a monopoly on the slang names of cocaine, as applied to a beverage.

The defendants are not concerned with plaintiff's having in the past sold to the general public a drink containing cocaine. This was done openly and above board, not only by plaintiff but by the manufacturers of many other cocaine containing soft drinks. (See foot notes [15] and [16], pp. 146-8). The public was put on notice by the word "Coca" in the names of several of these beverages that cocaine was present. Consumers could take them or leave them as they pleased. The plaintiff's conduct which is complained of and which the Circuit Court of Appeals held to involve fraud and deception is that plaintiff continues to trade upon the false representation of the original name of its drink and that it increases the resulting deception by the use of pictures of coca leaves and cola nuts on its labels. While this conduct is continued, the plaintiff cannot, without obvious hypocrisy, assume the role of a penitent. Reformation must precede all just claims to a *locus penitentiae*.

PENALTY FOR TRANSFERRING A TRADE-MARK TO A MODIFIED OR DIFFERENT PRODUCT.

Nims on Unfair Competition and Trade-Marks, Second Ed., 1917, p. 416:

> §219. CHANGE IN GOODS TO WHICH TRADE-MARK IS APPLIED.—The goods to which the mark is applied must continue substantially the same. For instance, where an essential ingredient in a baking powder was changed, it was held that the right to the trade-mark applied to it was lost.

In the case referred to by Nims (Independent Baking Powder Co. v. Boorman, 175 F. R., 448; 456), it was held that a manufacturer of a baking powder in which the acid constituent was alum and which was sold under the name "Solar", as a trade-mark, lost all right it possessed in such trade-mark by transferring it to a baking powder in which phosphate was substituted for alum.

In *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y., 24, the plaintiff had used "Prince Metallic Paint" as a trade-mark for paint manufactured from iron from a certain mine. Later, he applied it to paint made from a different ore. This was held to be a fraud which prevented him from obtaining relief against infringement.

The underlying reason why the continued use by plaintiff of the name which had been used for its cocaine containing drink, on a drink containing no cocaine, would constitute a fraud on the public, was thus set forth by Judge Sanford in *United States v. Forty Barrels and Twenty Kegs of Coca-Cola*, 191 Fed., 438:

"Yet the entire proof unquestionably shows that the caffeine contained in the article 'Coca-Cola' is one of its regular, habitual and essential constituents, and that without its presence, that is, *if it were de-caffeinized*, so to speak, *the product would lack one of its essential elements and fail to produce upon the consumers a characteristic if not the most charactertistic effect which is obtained from its use*. In short Coca-Cola without caffeine would not be Coca-Cola as it is known to the public and would not produce the effect which the Coca-Cola bought by the public under that name produces, and if it were sold as 'Coca-Cola' without containing caffeine the public buying it under this name *would be in fact deceived*.

This rule is also applied in England.

In *Starey v. Chillworth Gun Powder Co.*, L. R., 24, Q. B. D., 90, the Government contracted with the Gun Powder Company to furnish a certain amount of gunpowder. The factory blew up and the company imported as good powder from Germany and put it in barrels with its own label and trade-mark. There was no contract that the gunpowder should be of its own manufacture. The government accepted it and did not complain of the quality. It was held to be a false trade description. The trade-mark had come to mean that the goods were manufactured by the company. It had no right to misapply it to the goods manufactured by others, and was liable to conviction for false trade description.

PARALLEL CASES.

Clothworthy v. Schepp, 42 Fed., 62, 63, (Lacombe, J.):

"The complainant himself is engaged in deceiving the very public whom he claims to protect from

the deception of others. He calls his preparation *'Fruit' Puddine.* In nine different places on his package this word 'Fruit' is repeated, as descriptive of the article, and *a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each package.* His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by the defendants, the substantial accuracy of which is not disputed, discloses the fact that his 'Puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color; it contains no fruit in any form. Under these circumstances, complainant's rights are not sufficiently clear to warrant the granting of a preliminary injunction. *Fetridge v. Wells,* 4 Abb. Pr., 144, approved in *Medicine Co. v. Wood,* 108 U. S., 218; 2 Sup. Ct., Rep., 436."

In *Leach v. Scharff,* 188 Fed., 446, 447, plaintiff called its remedy for coughs, colds, etc., "Oil of Pine", and the suit was to enjoin infringement of the name and unfair competition. (Kohlsaat, Circuit Judge):

"It appears from the record that there is such an article as oil of pine, that complainant's article has *no appreciable amount of any oil of pine in it, and that it is mainly liquified resin.* * * * While complainant's use of the name is undoubtedly original and fanciful as applied to his compound, *it yet describes an actual pharmaceutical article of trade,* and is, therefore, descriptive. This being so, complainant confronts the dilemma either of perpetrating a fraud on the public by claiming the presence of any oil of pine as an ingredient on the one hand, or, on the other hand, of claiming a trade-mark in the mere proper pharmaceutical designation of the drug or compound he seeks to protect. In either case, a court of equity is not open to him, nor is it to his administratrix, and the suit must be dismissed

for want of equity. The infringement complained of is plain and palpable and does not commend itself to the court. Under the facts of the case, as now presented, however, the court can grant no relief."

Moxie Nerve Food Co. of New England v. Madox Co. et al., 152 F. R., 493, 509 (Brown, District Judge):

From the nature of this case, as well as of all cases involving a trade-mark upon goods, whose exact character can be known only to the manufacturer, but which are put forth with specific statements to induce the public to purchase them, *the burden of proof as to the truth of the statements should rest upon the manufacturer.* A chancellor should not be required to assume on the bench what he would not believe without proof when off the bench. Proof should be required from that person within whose knowledge the fact rests. *Selma, Rome, etc., Railroad v. United States*, 139 U. S., 560, 567, 568; 11 Sup. Ct. 638, 35 L. Ed., 266. *There should be no such technical application of rules concerning presumptions or the burden of proof as to relieve a complainant from the obvious duty of satisfying the court that his goods are what they purport to be and what he represents them to be.* * * *

The natural contempt of the chancellor for a fraudulent imitator who sets up the defense that he is imitating only a fraud apparently has often led the courts to treat with leniency a complainant who seeks protection for a valuable business built largely upon misrepresentation. It is quite true that the defense of unclean hands comes with ill grace from a rival manufacturer who is a fraudulent imitator whose hands are equally unclean. Siegert v. Gandolfi (C. C. A., 2d Circuit, December, 1906), 149 Fed. 100. But this, as it seems to me, is entirely aside from the merits of such a defense. It is not a question of grace. The validity of such a defense is well established. Worden v. California Fig

> Syrup Co., 187 U. S., 516; 23 Sup. Ct., 161; 47 L. Ed., 282. As the court should not, in such cases, take into consideration the attitude of the defendant (187 U. S., 529; 23 Sup. Ct., 164; 47 L. Ed., 282), so they should not take it into consideration when discussing the question of the burden of proof.

This decision was concerned with a false representation that the soda fountain beverage Moxie contained nerve stimulant properties of a South American plant whose description by the plaintiff corresponded with the usual descriptions of coca. *It was found that the beverage did not contain coca nor the stimulant properties of coca,* and the bill of complaint was dismissed for fraud.

THE SYRUP OF FIGS CASES.

The "Syrup of Figs" cases are so closely analogous to the case at bar, that (except for the fact that the defendants in those cases were unquestionably guilty of unfair competition) they furnish almost exact parallels, and so justify a more extended reference to them.

It appears from the decision of Judge Colt, in California Fig Syrup Co. v. Putnam, et al., 66 Fed., 750, and more clearly from the decision on appeal (73 Fed., 814 (C. C. A.-6) Taft, J.), that the name "Syrup of Figs" bore to the compound upon which it was used the same relation which the name "Coca-Cola" bears to plaintiff's product. In the decision on appeal it was stated—

> "Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but *merely to give a weak support to the statement that the*

article sold is syrup of figs. This is a fraud upon the public."

Plaintiff claims to add just a suspicion of cola, to support the presence of "Cola" in its name, but relies upon the pure caffeine used for the physiological properties discussed and extolled in its recent advertising pamphlet (Plaintiff's Exhibit 92). The two cases would be exactly parallel if "Cola" were the only word in plaintiff's mark. Its position is not improved by the presence of the word "Coca" which even its own chief chemist admits is represented in the preparation solely by a trifling amount of dilute alcohol containing a little tannin and a possible trace of chlorophyll.

Following these decisions in the Syrup of Figs cases, the plaintiff therein changed its representations which were printed on its cartons to the following:

> "'This excellent remedy presents in a most acceptable form the medicinally laxative principles of plants known to act most beneficially, to cleanse the system effectually, to permanently overcome habitual constipation and the many ills dependent on it, etc. *The juice of figs in the combination is to promote the pleasant taste.*'"

Suit was then brought to enjoin unfair competition and in *California Fig Syrup Co. v. Worden*, 95 Fed., 132, (Morrow, J.) it was held that it was entitled to the relief asked. This judgment was affirmed on appeal. *(Worden v. California Fig Syrup Co.*, 102 Fed., 334 ("C. C. A."-9) Gilbert, J.) but this Court in Worden v. California Fig Syrup Co., supra, reversed the lower courts. Mr. Justice Shiras, in delivering the opinion, said:

> "Even if it were true that, at the time the medicine in question was first made and put upon the

market, the juice of figs was so largely used as one of the ingredients as to have warranted the adoption of the name 'Syrup of Figs' as descriptive of the nature of the medicine, *that would be no justification for continuing the use of the term after the manufacturers and vendors of the medicine ceased to use fig juice as a material ingredient.* Even if the term was honestly applied in the first instance, as descriptive, it would none the less be deceptive and misleading when, as is shown in the present case, it ceased to be a truthful statement of the nature of the compound. Nor are we disposed to concede that, under the evidence in the present case, the term 'Syrup of Figs', or 'Fig Syrup' was properly descriptive of the nature of the medicine when it was first made. *Then, as now, the operative laxative element was senna,* and the addition of the fig juice was, at the best, experimental and apparently was intended to attract the patronage of the public by holding out the name of the medicine as 'Syrup of Figs'.

"However that may be, it is now admitted that *the use of figs was found to be deleterious, and that their use, as a substantial or material ingredient, was abandoned.****

"That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars that the medical properties of their compound was derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public.***The company, by the use of the terms of its so-called trade-mark on its bottles, wrappers, and cartons continued to appeal to the consumers out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit.

"The bill in the present case contains the following allegations:

"Your orator further states that this laxative

medical compound or preparation, made and put up as aforesaid by your orator, has always been marked, named, and called by your orator, "Syrup of Figs", being advertised by your orator under that name, the name "Syrup of Figs", printed or otherwise marked upon every bottle of this preparation made and sold by your orator,—this name being also printed upon the boxes, packages or wrappers in which the bottles of this preparation are packed for shipment and sale, that it has been the practice of your orator to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form; that in all instances, not only the bottle which contains this preparation, but the box or carton which contains the bottles of this preparation, is marked with the words "Syrup of Figs", and also contains printed matter stating that this preparation is a medicinal preparation, and also giving a general idea of its uses and purposes. * * * Your orator further states that it and its said predecessors in interest were the first to pack and dress or mark a liquid laxative preparation or medicine in the manner illustrated by exhibits "A" and "B", —that is to say, in an oblong rectangular box or carton, with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton and on the border, within which, at the top, is a *representation of a branch of a fig tree, bearing fruit and leaves*, surrounded by the words 'Fig Syrup Company', or 'California Fig Syrup Company', and below which appear in large letters, the words, "Syrup of Figs".

"Upon such allegations and admissions of the complainant's principal witnesses, some of which are hereinbefore quoted, and upon the entire evidence in the case, and in the light of the authorities cited by the counsel of the respective parties, our conclusions are that the name 'Syrup of Figs' does not in fact, properly designate or describe the pre-

paration made and sold by the California Fig Syrup Company so as to be susceptible of appropriation as a trade-mark, and that the marks and names used upon the bottles containing complainant's preparation and upon the cartons and wrappers containing the bottles, are so plainly deceptive as to deprive the complainant company of a right to a remedy by way of an injunction by a court of equity.

"Accordingly, the decree of the Circuit Court of Appeals is reversed; and the decree of the Circuit Court is also reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint."

ADMISSIONS IN PLAINTIFF'S BRIEF.

Plaintiff's own argument shows beyond question that Coca-Cola is a name inherently calculated to deceive the public. By simply applying its reasoning with regard to "Cola" to the word "Coca", it will be seen that on its own presentation, its name is necessarily deceptive.

Then, strangely enough, the plaintiff arraigns the particular acts of the California Fig Syrup Company which are identical in nature and almost identical even in immaterial detail with its own acts, with such unanswerable logic as to leave no possibility of doubt as to its own guilt.

Plaintiff states on page 33 of its brief that its beverage was designed to have "some medicinal virtues" and that:

> "The caffeine contained in the cola nuts used in making Coca-Cola was not sufficient for the purposes of the beverage, and, therefore the pure caffeine was added to an amount approximating the amount present in tea or coffee."

And again on page 63:

> "Caffeine was wanted for its stimulating qualities, and more of it than was contained in the cola nuts used."

But coca extract has greater stimulating properties than cola extract or even caffeine, and in a beverage admittedly designed to have stimulating qualities, the stimulating property of caffeine could hardly be of the importance set out by plaintiff and the stimulant properties of coca of no importance at all. No reason appears from the record why the cocaine of the coca used should not be regarded as quite as important an element of the original drink as the caffeine of the cola.

But, even if it be assumed that the cocaine actually played but a minor part in the stimulating effect of the original Coca-Cola, the general public which had become familiar with the stimulant properties of coca through the various forerunning coca wine stimulants which were displaced by plaintiff's and other similar drinks (Rec., 655-6), would very naturally regard the word "Coca" as indicating the presence of the stimulating qualities of the drug. And certainly this impression would not be lessened by the use of pictures of the same coca leaves which were featured on the labels of Pemberton's widely sold French Wine Coca nor by Candler's advertising of the drink as "containing the tonic properties of the wonderful coca plant."

Plaintiff admits that from 1886 to about 1900, Coca-Cola contained as much cocaine as was present in the coca leaves used in making the preparation (page 98) and that the drink was then changed by removing the stimulant property of the coca from the drink. (Page 102).

That it was a fraud upon the public to use "Coca" in its name after removing the active principle of coca from its drink is not directly admitted by plaintiff, but in effect, it is, and clearly, although indirectly and in connection with its discussion as to its use of "Cola".

On page 70, it is stated:

> "Assuming that the caffeine is derived from tea leaves, it is said that the name Coca-Cola as applied to the beverage is a deceptive one, because the active principle of cola is not contained in it save in negligible proportion. And so, it is asserted, people are deceived. But people either know or they do not know what that active principle is. If they do know, they know that it is caffeine, and as the beverage contains caffeine, the very same principle that is found in the cola nut, they are not deceived, because *they expect caffeine* and they get caffeine."

And again on page 74:

> "But it may be said he wants not the fiber of the nut but its active principle. He may not know what that is, but assume that he does. It is caffeine and he gets caffeine and more than was found in the cola nuts used."

Obviously, there is no different reasoning to be applied to the one stimulant drug than to the other and on plaintiff's own reasoning, consumers of its beverage who know what the active principle of coca is, or who even know that coca has a stimulant quality, are bound to be deceived by the use of "Coca" on a preparation from which the active principle of coca has been abstracted. To borrow plaintiff's language, they *"expect"* cocaine or some stimulant quality.

On page 38, plaintiff states with reference to its right to use "Coca" in its name:

> "It was not necessary for that purpose to use the coca leaf at all. The use of pure cocaine would justify the word coca."

But if the words "Coca" and "Cocaine" are admittedly thus so nearly synonymous or related, it is not apparent how the "Coca" could properly designate a residue devoid of the active principle of coca any more than "opium" could properly designate a residue devoid of its active principle, morphine, or "nux-vomica" could properly designate a residue devoid of its active principle, strychnine.

Plaintiff attempts to justify the use of "Cola" to designate the presence of caffeine from some other source than the cola nut by contending that "Cola" necessarily implies the presence of its active principle, caffeine, and that caffeine is caffeine from whatever source derived.

Thus, on page 66, it is stated:

> "Even if the word cola in the name was suggestive in the manner and measure implied by the Court of Appeals, in a case where the facts are as in this, it would be without significance. To say that a thing is something with which it is absolutely identical cannot be a material misrepresentation. Conceding for the sake of argument that the name Coca-Cola suggests everything that can be claimed for it in the way of representations as to caffeine, and the answer is that there is but one such subsance. 'Caffeine is caffeine.'."

But plaintiff's whole argument with reference to "Coca" is that its use does not even suggest the presence of *its* active principle, cocaine.

On pages 38 and 39, plaintiff admits that the amount of caffeine from cola nuts in its drink is negligible.

> "But in making this beverage they added pure caffeine to that contained in the cola nuts, which added caffeine was not obtained from cola nuts, but was in every respect identical with and indistinguishable from that so obtained. So far as caffeine was concerned, the amount contained in the cola nuts used, was practically if not altogether negligible, and if not it was much more convenient to add a touch more of pure caffeine, than to extract it from crude cola nuts."

The expert's testimony shows that if there is any caffeine from the cola nut in Coca-Cola it is not there in an appreciable amount and the admission that it was and therefore, still is, "practically if not altogether negligible" in amount, raises the clearly defined question whether plaintiff is justified in indicating by the use of the word "Cola" the presence of a substance which is, in fact, not present in a substantial or material, or even in an appreciable, amount.

The argument that the use of the word "Cola" is justified by the presence of a substantial amount of caffeine derived from some other source than the cola nut is obviously unsound. The thought does not appear to have suggested itself to plaintiff that there may be dainty or even say finicky people who might really prefer a stimulant drink whose stimulating quality was due to the extract of cola nut to one whose stimulant quality is due to caffeine derived from tea dust or sweepings or made artificially from uric acid occurring in the guano deposits of South America. (See foot note 13, p. 147).

Plaintiff is not entitled to deceive the public as to the source of the caffeine present. (*Manhattan Medicine Co. v. Wood*, 108 U. S., 218).

Plaintiff, on page 116, says:

> "The Court of Appeals was apparently of opinion that with a change in the beverage there should have been a change in its name. But why?"

The plaintiff could certainly have found one very good answer to its question on page 416 of Nims on Unfair Competition and Trade-Marks, (2nd. Ed.) or in the reasoning of Judge Sanford (191 Fed., 438) in his discussion of the deception which would be practiced on the public if plaintiff should sell a "de-caffeinized" product as Coca-Cola. It could, however, find another and equally good answer by applying its own reasoning on page 70 of its brief regarding the necessity of having the active principle of cola present in its drink to prevent deception of those who know what the active principle of cola is.

Plaintiff's argument that the impression naturally conveyed by the word Coca has been wholly or in part offset by certain inferences presupposing an intimate acquaintance on the part of the general public with a certain provision of the Food and Drugs Act for the guidance of food and drug manufacturers and by its own published denials is thus set forth on page 61:

> "The beverage was in strict conformity with the Food and Drugs Act which prohibited, in articles of food, any poisonous or other added deleterious ingredient which may render the food injurious to health and required the package in case of drugs to bear a statement of the quantity or proportion of cocaine or other narcotic contained in it. The failure of the label thereafter to proclaim cocaine as a constituent of the beverage was tantamount to a declaration that the coca leaf in it had been decocainized,—that there was coca but no cocaine in it.

> And this negative instruction to the public was aided by the affirmative declarations of persistent advertising in which the statement was repeated over and over again."

But some people may not be thoroughly acquainted with the provision of the Food and Drugs Act referred to or even capable of making the necessary deduction therefrom or there may be those who, knowing of the provision, think that the Federal authorities have not yet gotten around to prosecute the plaintiff.

The printed denials of the presence of cocaine in Coca-Cola, as set forth in plaintiff's exhibits show rather the occasion for correcting the false impression produced by its name referred to by C. H. Candler (Rec., 441) than any possibility of doing it in this way. There is certainly nothing in the record to show that one out of a thousand Coca-Cola drinkers ever even saw a copy of either *plaintiff's exhibits* 90, 91, or 92, or any advertisements of like character.

Obviously, while plaintiff continues to mislead the public by the use of "Coca" in its name, it cannot hope to successfully correct the false impression thus created by issuing technical treaties of little or no interest to a soft drink consumer, any more than one could hope to bring a ship safely into port by luring with a beacon placed upon the rocks and guiding only by a taper in the harbor.

Regarding the use of the name "Syrup of Figs" on a laxative remedy whose active principle was senna and which contained what Judge Taft termed, "just a suspicion of fig juice", plaintiff, on page 72, says:

> "There the thing was not what it was said to be

and the misnomer was both a suggestion of falsehood and a suppression of the truth;***There the name asserted that the product was syrup of figs, when it was not and did not contain any syrup of figs."

Syrup or juice of figs was in fact present, but only in a trifling amount and the manufacturer printed on the label:

"The juice of figs in the combination is to promote the pleasant taste."

Plaintiff's name involves the same suggestion of falsehood and suppression of the truth since admittedly there is no real coca present and at most, only a suspicion of cola. Plaintiff, however, does not inform the public, as did the California Fig Syrup Company that coca and cola are used only "to promote the pleasant taste" as it now contends they are.

Plaintiff, on page 72, says:

"There the active principle of the medicine was asserted to be syrup of figs, which involved a double falsehood."

But Syrup of Figs was asserted to be the active principle of the medicine *only* by using these words in its name exactly as plaintiff uses "Coca" and "Cola" in its name.

Plaintiff, on pages 72 and 73, says:

"There was suppression of the truth; no suggestion of the fact that the active principle of the medicine was senna, and the fact suppressed because the name attributed the virtues of senna to the nonexistent syrup of figs."

The California Fig Syrup Company printed on its labels:

> "This excellent remedy presents in a most acceptable form the medicinally laxative principle of plants known to act most beneficially to cleanse the system, etc."

But plaintiff uses "Coca" and "Cola" in its name and does not even suggest that its beverage depends for its stimulant action upon pure added caffeine.

Plaintiff, on page 73, also says:

> "There the name appealed to a prevalent popular opinion—as to the laxative efficacy of syrup of figs—and practiced a deception through that opinion."

From the testimony of Murphy (Rec., 1285-8), Robinson (Rec., 365), Dobbs (Rec., 328), Peters (Rec., 655-6), and many other witnesses, it appears that the public had, in 1886, been taught to regard coca as a nerve tonic and stimulant so that plaintiff's name appealed to a prevalent popular opinion, the only difference being that the opinion regarding coca was true and therefore likely to persist and increase rather than to die out.

The California Fig Syrup Company used the representation of a branch of a fig tree bearing fruit and leaves while the plaintiff shows only the leaves of the coca plant and the fruit of the cola tree. Plaintiff attempts no differentiation regarding these illustrations nor does it comment upon the analogy of its situation and conduct to those of the California Fig Syrup Company with respect to finding the use of fig juice disadvantag-

eous, abandoning the use of all material amounts of it in its preparation and finally claiming that the little used was for flavoring purposes. Furthermore, plaintiff does not comment upon the statements issued years after Syrup of Figs became popular, to the effect that the medical properties of its preparation were derived from senna nor upon the fact that the California Fig Syrup Company—

> "by the use of the terms of its so-called trade-mark on its bottles, wrappers, and cartons continued to appeal to the consumers out of whose credulity came the profits of their business."

RULE OF RES JUDICATA NOT APPLICABLE WHERE NEITHER THE PARTIES, THE ISSUE, THE PLEADINGS, NOR THE EVIDENCE WAS THE SAME AND WHERE THE JURISDICTION OF THE TRIBUNALS WAS WHOLLY DIFFERENT IN BOTH NATURE AND SCOPE.

The plaintiff contends that the question here involved is *res judicata* in view of the decision of the tribunals of the Patent Office holding that the Koke Company of America, one only of the five defendants herein, was not entitled to register the word "Koke" as its trade-mark.

(1) NO PRIVITY OF PARTIES.

Southern Koke Company, Ltd., Koke Company of Texas, Koke Company of Arkansas, and Koke Company of Oklahoma, were at all times wholly separate and distinct organizations from the Koke Company of America. Those that are still in existence are merely wholesale dealers who buy from the latter concern. There is no privity of the parties.

(2) THE ISSUE DIFFERENT.

In the Patent Office case, the only question in issue was the right of the Koke Company to register the mark "Koke". The Patent Office held, as contended by defendants herein, as follows:

> "Applicant's argument to the effect that "Koke" is a generic term used by many persons as a name for a class of drinks is not dependent solely upon the unprinted portion of applicant's record. Evidence in support of such a use of that term is to be found in the printed records of both parties (see testimony of Boylin, Qs. 52 to 64, Applicant's Rec., pp. 216, 217; Sidebottom XQs. 110, 111, Applicant's Rec., p. 254; Brown, Q. 14, Opposer's Rec., p. 1039; Christy, XQs. 135, 136, Opposer's Rec., p. 1903). Moreover, to such extent as the use of "Koke" as a generic term or name for a class of drinks may be found to constitute a reason for refusing to register the same as a trade-mark, the use in that sense may be regarded as formally admitted by counsel for applicant (Applicant's Brief, pp. 157, 164, 167 168).
>
> In view of the rulings which have been made to the effect that the word "Koke" is used to a material extent by persons desiring to purchase Coca-Cola, and that the same word is frequently used as a generic term or name for a large class of drinks, the applicant's right to register is held to be dependent upon proof that "Koke" was used as a distinguishing mark for applicant's goods prior to the time at which the public began to use that word either as a nickname for "Coca-Cola" or as a generic name for any cola drink." (Exhibit E, Appendix to Petition for Certiorari, pp. 67-8).

> "In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trade-mark the popular pseudonym for the goods which he sells. The answer must be in the negative." (Exhibit F, Appendix to Petition for Certiorari, p. 81).

(3) THE PLEADINGS AND DECISIONS DIFFERENT.

The question of plaintiff having unclean hands by reason of its use of the deceptive name "Coca-Cola" or by reason of misbranding or adulteration of its product was not raised nor referred to, in the Koke Company's answer to the notice of opposition nor by its appeal from the decision of the examiner of interferences nor by its appeal from the decision of the Commissioner of Patents, as will be evident from the certified copies of papers Nos. 59, 104, and 114 of the record of Opposition No. 1424, set forth in Appendix No. 1, Vol. 2, nor were any of these questions in any way referred to in the briefs filed by the Koke Company before the examiner of interferences and the commissioner of patents. None of these questions having been raised by the Koke Company, they were not considered nor were they in any way referred to in the decision of the examiner of interferences (See examiner's decision, Exhibit E, Appendix to Petition for Certiorari, pp. 61-77) nor in the decision of the commissioner of Patents, except casually, as follows:

> "There has been much litigation bearing upon the matter here presented. In *United States v. Coca-Cola Company*, 241 U. S., 265, decided about a year ago, the case was remanded for further proceedings. The outcome of this case may affect the right of the company to apply the name "Coca-Cola" to its product which, I think, would affect the standing of the opposer. But this suit has not according to my latest information, though now under negotiation, been finally disposed of.
>
> Of more direct bearing upon the issues here presented are two district court decisions. The first is the decision of Judge Sawtelle of the District Court of Arizona. The opinion is found in the brief of

the Coca-Cola Company before the Commissioner, page 85. The decree was dated September 16, 1916. I understand that the appeal has not been disposed of.

The second decision was in the District Court for the Eastern District of Louisiana. The decree, by Judge Foster, is dated May 24, 1917, and a certified copy was filed with me on the first day of June, 1917.

In each of these decrees there are findings of fact that the word 'Koke' is an abbreviation of the name 'Coca-Cola' used by the public and by purchaser in designating coca-cola; that the Koke Company of America, and its predecessor, did not adopt or use the name 'Koke' until the year 1909; and that it was adopted and used with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company." (Exhibit F, Appendix to Petition for Certiorari, pp. 78-9).

(4) THE EVIDENCE DIFFERENT.

The evidence considered in Opposition No. 1424 was not the same nor substantially the same as the evidence herein. The testimony of 115 witnesses for defendants was considered in this case while that of only 42 of such witnesses was considered by the Patent Office, as shown by the copy of the index of the Koke Company's record, set forth in Appendix No. 2, Vol. 2.

The defendant's testimony as to deception, misbranding and adulteration, i. e., that of Drs. C. A. Meserve, J. J. Kessler, and W. M. Simonson, was not considered by the Patent Office, nor were the Defendants' Exhibits, No. 232 to 272 inclusive, introduced in connection with the deposition of J. J. Kessler, ever before the Patent Office. The defendants' Exhibit No. 271, which is a

certified copy of the Coca-Cola label registered in the Patent Office is one of these exhibits.

The reason for excluding from consideration the testimony of nearly two-thirds of the defendants' witnesses including that of Drs. Meserve, Kessler and Simonson was thus stated by the Patent Office examiner of interferences:

> "By an agreement of the parties, approved by the Patent Office, the testimony in this case was taken contemporaneously with the testimony in certain court proceedings pending between the same parties. Certain testimony taken by the applicant was not entitled as testimony to be used in this proceeding before the Patent Office. A typewritten copy thereof was introduced by the opposer *but was not printed*. This testimony might have been used by either party, had it been printed, *as required by the rules*. Because neither party printed the same it was ruled at the hearing, after reading the agreements relative thereto (Applicant's Rec., p. 66; Applicant's Brief, pp. 157, 161) that the unprinted testimony should not be considered in behalf of either party to the interference. (Exhibit E, Appendix to Petition for Certiorari, p. 67).

The Koke Company filed with the Commissioner of Patents a notice of appeal, a copy of which appears in Appendix No. 1, Vol. 2, but no appeal was ever perfected in the Court of Appeals of the District of Columbia, as shown by a certified copy of papers Nos. 115 and 116, in Opposition No. 1424, (Appendix No. 3, Vol. 2).

(5) THE JURISDICTION OF TRIBUNALS WHOLLY DIFFERENT.

While the Commissioner of Patents is an officer having quasi-judicial authority, it is well settled that decis-

ions of the Patent Office, while persuasive, are not controlling upon the Courts in suits between the same parties involving the same questions passed upon in the Patent Office.

Leonard v. Cutler-Hammer Mfg. Co., et al., 156 Fed., 791.
Eagle White Lead Co. v. Pflugh, et al., 180 Fed. 579
General Electric Co. v. City of Dunkirk, et al., 211 Fed., 658.

FINDINGS OF FACT BY THE DISTRICT COURT UNSUPPORTED BY THE EVIDENCE.

The following findings of fact by the District Court upon which it based its decree are not supported by the evidence:

(a). That the word "Coca-Cola" is a valid trademark.

(b). That the words "Koke" and "Dope" are each an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola".

(c). That the defendant, the Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that they had and have no right to its use.

(d). That the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

(e). That the defendants' salesmen were instructed

to sell and did sell defendants' products under the names "Koke" and "Dope" as and for "Coca-Cola".

(f). That the defendants, and each of them, have infringed the plaintiff's trade-mark, and have been guilty of unfair competition with the plaintiff.

The court's injunction is unjustified in so far as it forbids any of the following acts:

(g). The use of "Koke" or any like word.
(h). The use of "Dope" or any like word.
(i). The use of defendants' present labels, etc.
(j). The use of red syrup barrels.
(k). The coloring of any product like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of the defendants and not of the plaintiff.

THE WORDS "COCA-COLA" NOT A VALID TRADE-MARK.

The plaintiff sets up in its pleadings and relies upon, two trade-mark registrations, No. 22,406 granted January 31, 1893, under the Trade-Mark Act of March 3, 1881, and No. 47,189, granted October 31, 1905, under the Trade-Mark Act of February 20, 1905.

The first registration is invalid because the Act of 1881 did not provide for the registration of descriptive or deceptive words. The second registration is invalid (a) because plaintiff did not have exclusive use of the words "Coca" and "Cola" as applied to the drugs they designate in plaintiff's product during the "ten year period", (b) because each word was separately used in soft drink names to designate the presence of the cor-

responding drugs, in other soft drink names during such period, and (c) because when such registration was applied for and when it was granted, the plaintiff's mark "was used in unlawful business" and was "used with the design of deceiving the public in the purchase of merchandise."

The invalidity of plaintiff's trade-mark upon these grounds was set up in the defendants' answer. (Rec., 51-4).

If it shall be found that these registrations are invalid, they should be canceled, under the provisions of Section 13, of the Act of 1905.

REGISTRATION NO. 22,406 INVALID.

The words "Coca" and "Cola" are each purely descriptive words which have been in general and continuous use in exactly the sense in which they were used when adopted as a name for plaintiff's product, since long prior to 1886, to the present time.

Neither of the names was the proper subject of a trade-mark for a preparation containing coca or cola when the alleged trade-mark was adopted.

Amoskeag Mfg. Co. v. Spear, 2 Sand. S. C., 599; Cox, 87:

> No one has a right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. (*Canal Co. v. Clark*, 13 Wall., 311 324). Hence no one can acquire an exclusive right to the use, as a trade-mark, of a generic name, or word, which is merely descriptive of an aritcle, or a

> sign, symbol, figure, letter, brand, form or device, which either on its face or by association indicates or denotes merely grade, quality, class, shape, style, size, *ingredients*, or composition of an article or a word or words in common use designating locality, section or region of country.

Among the numerous decisions to the same effect, are: *Canal Co. v. Clark*, 80 U. S., 311; 20 L. Ed., 581; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S., 51; 25 L. Ed., 993; *Brown Chemical Co. v. Meyer*, 139 U. S., 540; 35 L. Ed., 247; *Columbia Mill Co. v. Alcorn*, 150 U. S., 464; 37 L. Ed., 1144; and *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S., 446; 55 L. Ed., 536.

It is urged, however, as it was in United States v. The Coca-Cola Company, *supra*, that although "Coca" indicates one ingredient of Coca-Cola and "Cola" another, yet the plaintiff was the first to use a name made up of the names of both ingredients.

But, in the first place, plaintiff was not the first to use both words. Benjamin Kent, of Patterson, N. J., applied the name "Coca-Cola" to his stimulant remedy made of coca and cola, over a year before it was applied to Dr. Pemberton's preparation (Defendant's Exhibits 68 and 70).

In the second place, it would be immaterial even if the two words were first used together in connection with plaintiff's Coco-Cola. The mere coupling of two words descriptive of ingredients of a composition does not make the combination less descriptive. On the contrary, it would be, if anything, even more specifically descriptive since it announces the presence of more than a single ingredient.

38 *CYC.*, 857-8:

"A combination of non-registrable words is not entitled to registration."

28 *Am. & Eng. Enc. of Law*, 375:

"Words merely descriptive of the ingredients of which the article is composed do not constitute a valid trade-mark. Upon this ground the name of an article consisting of a compound of the names of its ingredients has often been refused protection, though it seems that these decisions might have proceeded upon the broader ground that the generic name of an article cannot be a trade-mark."

Colgan et al. v. Danheiser et al., 35 Fed., 150, (Gresham, J.):

"The complainants'***insist that by virtue of prior appropriation, they are entitled to the words "Taffy Tolu" in this connection, as a trade-mark indicating the origin of their goods. *The complainants have no patent which secures to them a monopoly in the exclusive use of the ingredients which constitute their goods, or in the goods themselves.* The words, "Taffy Tolu", indicate or describe the character of the labeled goods, rather than their origin. The defendants have an equal right to make and sell Taffy Tolu, provided they make and sell it as their own manufacture, and not as that of the complainants. *The words being descriptive of the compound or goods, they are incapable of appropriation.* The proper designation of an article cannot be appropriated as a trade-mark; and it is quite immaterial who first gives the proper name to a new article. The defendants are at liberty to make and sell Taffy Tolu the same or similar in ingredients as the complainant's manufacture, provided they label and sell the article as made by themselves, and not by the complainants, which they seem to be doing."

British-American Tobacco Co., Limited, v. British-American Cigar Stores, Co., 206 Fed., 189, (Ward, J.):

> "The bill challenges the right of the defendant to use the words 'British-American', as a part of its corporate title, and prays that such use may be enjoined. The words, being geographical, cannot be appropriated as a trade-mark."

In re Meyer Brothers Coffee and Spice Company, 32 App. D. C., 277, (Van Orsdel, J.):

> "Neither of the words used in this combination would, standing alone, be registerable as a trade-mark for coffee. The word 'America' is clearly geographical. (*Shaver v. Heller & Merz*, 108 Fed., 821.) The word 'Strength', if used as a mark on coffee, would be descriptive of quality and likewise prohibited by section 5 of the Trade-Mark Act of 1905. This court has held that a registerable mark cannot be made by combining two non-registerable words. (*Kentucky Distilleries & Warehouse Co. v. Old Lexington Club Distilling Co.*, C. D., 1908, 417; 135 O. G., 220; 31 App. D. C., 323)."

The law, as thus stated, has been applied in numerous cases. In each of the cases set out below, the combination of words was held to be invalid as trade-marks because of consisting of descriptive words.

Canal Co. v. Clark, 80 U. S., 311:

> "Lackawana Coal" applied to coal from the Lackawana district.

Brown Chemical Co. v. Meyer, et al., 139 U. S., 540:

> "Brown's Iron Bitters" applied to a medicine.

Allegheny Fertilizer Company v. Woodside, 1 Hughes,

115; Fed. Case No. 206:

"Ammoniated Bone Superphosphate of Lime" applied to a fertilizer.

Caswell v. Davis, 58 N. Y., 223; 17 A. M. Rep., 223, 242:

"Ferro-Phosphorated Elixir of Calisaya Bark" for a medicine.

Rumford Chemical Co. v. Muth, 35 Fed., 524:

"Acid Phosphate" applied to a medicine.

Clotworthy v. Schepp, 42 Fed., 62:

"Rose Vanilla" applied to a pudding flavored with rose and vanilla.

Schmidt v. Brieg, 100 Cal., 672; *Same v. McEwen*, 35 Pac. Rep., 854:

"Sarsaparilla and Iron" applied to a tonic.

Paris Medicine Company v. W. H. Hill, 102 Fed., 148; (C. C. A.-6):

"Bromo-Quinine" applied to a medicine containing a bromine salt and quinine.

Computing Scales Co. v. Standard Scale Co., 118 Fed., 965; (C. C. A.-6):

"Standard Computing" applied to scales.

Searl and Hereth Co. v. Warner, 112 Fed., 674; (C. C. A.-7):

"Pancreopepsin" applied to a preparation of pancreas and pepsin.

Peter Schoenhofen Brewing Company v. Maltine Co., 30 App. D. C., 340:

"Edelweiss-Maltine" applied to beer.

Kentucky Distilleries and Warehouse Co. v. Old Lexington Club Distilling Co., 31 App. D. C., 223:

"Old Lexington Club" applied to whiskey.

John T. Dyer Quarry Co. v. Schuylkill Stone Co., 185 F. R., 557:

"Birdsboro Trap Rock" applied to trap rock quarried at Birdsboro, Pa.

Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., 235 Fed., 657; (C. C. A.-6):

"Toasted Corn Flakes" applied to toasted flakes of corn.

Even before the decision of this Court in *United States v. The Coca-Cola Company, supra*, the descriptive character of plaintiff's name was recognized.

In *Coca-Cola Co. v. Deacon Brown Bottling Co.*, 200 Fed., 105, Judge Grubb said:

> "The right of complainant to use the words 'Coca-Cola' as a technical trade-mark under the Act of 1881 is doubtful, at least, in view of the fact that the words are admittedly suggestive, and probably merely descriptive of the constituents of the beverage, and not subject to appropriation as a trade-mark."

In *Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 154, Judge Sanford said:

> "The question whether the compound word 'Coca-Cola' is so descriptive of the constituents of the beverage that it was not originally subject to appropriation as a trade-mark is one of such doubt

that if this were the only question in the case, the complainant would not, I think, be entitled to a preliminary injunction."

In *United States v. The Coca-Cola Company, supra,* Mr. Justice Hughes, in delivering the opinion, said:

> "In the second count it was charged that the expression 'Coca-Cola' represented the presence in the product of the substances coca and cola. *** We are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged."

Indeed, by later registering the words under the Ten-Year Clause of Section 5 of the Trade-Mark Act of 1905, plaintiff appears to have acknowledged that the words are purely descriptive.

That the name "Coca-Cola" was adopted to indicate the presence of coca and cola in the preparation (Rec., 354), even though little or no cola was actually used, and that the public regards this name as indicating the presence of these ingredients, would seem to put this question beyond possible controversy. The name was certainly either wholly descriptive or in part descriptive and in part deceptive as applied to what was in fact Coca-Caffeine, and in either case it was not entitled to registration.

AUTHORITY FOR CANCELLATION.

Section 13 of the Act of 1905, providing for the cancellation of trade-mark registrations, applies also to registrations under the Act of 1881 *(Stamato Moulos v. Stephano Bros.,* 41 App. D. C., 590) and courts may

order the cancellations of the registration of a mark in an action for infringement (*Waldes & Co. v. International Mfgrs. Agency Inc.*, United States District Court, Southern District of New York, Hand, J., decided December 8, 1916, and reported in the Trade-Mark Reporter, Vol. 7, p. 7). In *Hudnut v. Phillips v. Mack*, 256 O. G., 822, it was held that a trade-mark registration, even under the Act of 1881, may be canceled as an incident to a Patent Office interference decision. There is, therefore, ample authority for this court to direct that this registration be canceled.

REGISTRATION NO. 47,189 INVALID.

This registration was granted on an application filed April 22, 1905, under the "ten year clause' 'of the Act of 1905, the pertinent parts of which are as follows:

> "That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark. * * * *Provided*, that no mark which consists merely * * * in words or devices which are descriptive of the goods with which they are used or of the character or quality of such goods * * * shall be registered under the terms of this Act. * * * *Provided, further*, that nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations, or among the several states, or with Indian tribes, which was in actual and *exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for ten years next preceding the passage of this Act.*"

The plaintiff has failed to show that it had the required exclusive use of the words constituting its alleged

mark during the ten year period. On the other hand, the record shows without dispute that both the words "Coca" and "Cola" were in general use during such period, both as the common names of the ingredients they originally designated in plaintiff's name and which they are now supposed to designate therein and that both words were in general use in trade names for preparations similar to Coca-Cola to designate the presence of these materials therein, throughout this period.

It is not questioned that the names "Coca" and "Cola" were used to designate these drugs before and throughout the ten year period.

"Wine of Coca",—the wine tonic,—was manufactured by druggists everywhere, and sold throughout the country under that name until nine or ten years ago. (*C. G. Peters*, Rec., 656). "Wine of Coca" was also made into a soda fountain syrup similar to plaintiff's product, and manufactured in Atlanta, by the Wine of Coca Company, a corporation, and sold in that form and under that name during the ten year period. (*J. C. Mayfield, Rec.*, 1592-3; *Lee Hagan, Rec.*, 1292; *F. C. Dorider, Rec.*, 1195; *Geo. R. Edmondson, Rec.*, 1301; *S. T. Mayfield, Rec.*, 1468; *Henry Boerger, Rec.*, 969) from 1893 (*J. C. Mayfield, Rec.*, 1592-3; *Lee Hagan, Rec.*, 1292; *S. T. Mayfield, Rec.*, 1468) to at least 1905 (*Boerger, Rec.*, 969; *Dorider, Rec.*, 1195; *Edmondson, Rec.*, 1301) and was manufactured and sold by the Boston branch of the Wine of Coca Company for several years, beginning in 1898 (J. C. Mayfield, Rec., 1593). "Coca-Nola" and "My-Coca", both similar in all respects to plaintiff's product, have been marketed under those names since around 1900 (*C. N. Baker, Rec.*, 1407; *Charles Kingsburry, Rec.*, 467). A similar preparation, marketed under the singe name "Coca", was sold

at Louisville, Kentucky, *(C. G. DeSouche, Rec.,* 1349), and, in fact, there were "a number of 'Coca's' " with a little difference in the latter part of the name,—instead of making it 'Coca-Cola', they would make it 'Coca'—something". *(DeSouche, Rec.,* 1349).

Defendant's predecessor, J. C. Mayfield, and his successor, the J. C. Mayfield Mfg. Co., continuously manufactured and sold "Celery Cola",—a beverage similar to plaintiff's,—under the name "Celery Cola", from 1893 to at least 1909. "Cola-Ade", another beverage similar to plaintiff's, was manufactured by Wiley, in Atlanta, and enjoyed quite an extensive sale in several of the Southern States during the ten-year period. *(William M. Sidebottom, Rec.,* 1163; *F. C. Dorider, Rec.,* 1195). "Afri-Cola", still another product similar to plaintiff's, has been manufactured by Hagan & Dodd, in Atlanta, and sold under that name, since 1899. *(Lee Hagan, Rec.,* 1292). This is formally admitted of record. (Rec., 1296). "Star-Cola", still another drink similar to plaintiff's, has been manufactured by Diehl & Lord, at Nashville, Tennessee, and sold under that name, since 1900 *(Adam Diehl, Rec.,* 1083-5). Diehl says that there were eight or ten or fifteen "cola" products at that time, *(Rec.,* 1085). "Orin-Cola" has been manufactured in St. Louis, Missouri, by Norville N. Leaver, and sold under that name, since March 1st, 1904. *(Norville N. Leaver, Rec.,* 2036; *John H. Bohne, Rec.,* 2045).

The District Court based its decision in this case that the words "Coca-Cola" constitute a valid trade-mark upon the opinion of Judge Grubb, in the case of *Coca-Cola Co. v. Deacon Brown Bottling Co.,* 200 Fed., 105, and, perhaps, also, upon the decision in *Nashville Syrup Co. v. Coca-Cola Co.,* 215 Fed., 527. In passing upon this question, Judge Sawtelle said:

> "The question of the validity of the trade-mark 'Coca-Cola' and the right of plaintiff to its exclusive use since its registration under the Act of Congress of February 20th, 1905, would seem to be placed beyond the pale of contention by the case of *Coca-Cola Co. v. Deacon Brown Bottling Co.*, 200 Fed., 105." (Rec., 238).

The case cited was just an application for a preliminary injunction, and was tried simply on affidavits. *Nashville Syrup Co. v. Coca-Cola Co., supra.* It was likewise tried both on final hearing in the District Court and in the Circuit Court of Appeals, simply upon the affidavits submitted on a previous application for a preliminary injunction. Evidently the affidavits in those cases failed to show that the words "Coca" and "Cola" had both been in general use during the whole of the ten-year period applied to these drugs or that they had been used in the names of soft drinks supposed to contain them during such period.

Rule 19 of the Rules Governing the Registration of Trade-Marks under the Trade-Mark Acts provides—

> "* * * and no trade-mark will be registered which is used in unlawful business, or upon any article injurious in itself, or which has been used with the design of deceiving the public in the purchase of merchandise, or which has been abandoned."

This rule is based upon Section 21 of the Act of 1905, which provides—

> "Sec. 21. That no action or suit shall be maintained under the provisions of this act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been

abandoned, or upon any certificate of registration fraudulently obtained."

Rules of the Patent Office which are not inconsistent with the express provisions of the statutes are valid and have the force and effect of law in all matters to which they relate. (*Steinmetz v. Allen, Commissioner of Patents*, 192 U. S., 543). It appears, therefore, that registration No. 47,189 is invalid both because of plaintiff not having the required exclusive use during the "ten year period" and because when application was made therefor, it was used in the unlawful business of deceiving the public by selling its product under a deceptive name.

REGISTRATIONS NOS. 22,406 AND 47,189 SHOULD BE CANCELED.

If it be found that plaintiff's registrations are invalid, obviously they should not remain on the list of registered trade-marks. Both were set up in the bill of complaint as amended and both constitute a real and unlawful menace not only to defendants but the whole cola drink industry. The public interest would, therefore, be served by their cancellation exactly in accordance with the purpose of the cancellation provision of the Act of 1905.

DEFENDANTS HAVE NOT INFRINGED PLAINTIFF'S TRADE-MARK.

"Koke" and "Dope" quite obviously do not infringe "Coca-Cola" and there is no evidence whatever to justify the District Court's finding in this regard.

So far as "Dope" is concerned, plaintiff did not even allege in its pleadings that it deceptively resembles

Coca-Cola and no such contention has been made by it.

It has been twice decided that "Koke" and "Coca-Cola" are not deceptively similar. In the first case (*The Coca-Cola Company v. Branham, et al.*, 216 Fed., 264) the defendants were using the word "Koke" on their packages in the same style of type as that in which the defendants in this case are using it. In passing upon the question of infringement, Judge Youmans said:

> "There is no evidence to show that defendants have been guilty of infringement of plaintiff's trade name."

The other case was that of *Coca-Cola Company v. Koke Company of America*, Opposition No. 1424 in the Patent Office. In passing upon the question of infringement, upon identically the same testimony *on behalf of the plaintiff* as in this case, the Examiner of Interferences, said:

> "The opposer (the Coca-Cola Co.) has not established by the evidence which has been introduced, and *does not appear to have attempted to establish that any person has ever been misled*, as a result of any similarity or resemblance between the marks 'Coca-Cola' and 'Koke' into a purchase of applicant's (the Koke Company of America's) goods, believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark 'Koke' bears to the mark 'Coca-Cola'." (Exhibit E, Appendix to Petition for Certiorari, p. 65).

In the *Branham* case, *supra*, after alleging that the word "Koke" is a deceptive imitation and infringement

of the words "Coca-Cola", and that its presence on the caps and labels of defendants' bottles, as there displayed, had misled the public into the purchase of defendants' product believing it to be the product of plaintiff, the bill proceeded:

> "To aid in the deception so practiced, and by and with the advice, knowledge, and consent of the respondents, said men and boys (who sell and dispense defendants' beverage to the public) at once, and before handing the bottles containing such substitute to the purchaser thereof, have been and are accustomed to *remove* the *caps* from said bottles whereby the purchaser is likely to detect the deception practiced upon him." (Defendants' Exhibit 272, page 15).

In the case at bar, after alleging in the original bill that defendants brand their goods and packages with the word "Koke" printed in a style of type deceptively resembling that in which plaintiff prints the words "Coca-Cola", for the fraudulent purpose of causing the public to believe, when they see that word printed in that style of type on defendants' package, that it is plaintiff's alleged trade-mark "Coca-Cola" affixed thereto, and of thus deluding them into accepting defendants' product as the product of the plaintiff; and that defendants advertise their product under the name "Koke", and put up signs bearing that word, printed in that alleged deceptive style of type, at soda fountains and soft drink stands where their goods are on sale, for the fraudulent purpose of causing the public to believe, upon seeing the word "Koke", as so printed on said signs and advertisements, that it is "Coca-Cola" that is advertised and on sale at said establishments, and of thus causing them to patronize those establishments and drink defendants' product under the false notion that they are

patronizing "Coca-Cola" establishments and are drinking "Coca-Cola"; and that, by the alleged fraudulent means aforesaid, defendants have enabled dealers to pass off their product as plaintiff's product; how did plaintiff go about proving these charges? It proved them, just as it did in the *Branham* case, by bringing forward evidence purporting to show that dealers remove the crowns, bearing the word "Koke", from the bottles containing defendants' product before serving same to the public, for the fraudulent purpose of preventing the public from seeing the word "Koke" printed in the alleged deceptive style of type referred to, on those crowns, and thus readily detecting that the article is not "Coca-Cola"; and that the defendants shipped their syrup, in one instance, to a soda fountain proprietor who was fearful of incurring the vengeance of the Coca-Cola Company by being caught handling the goods of a rival, in a plain barrel, with the label bearing the word "Koke" left off, for the fraudulent purpose of preventing the public from seeing the word "Koke" on the label and thus readily detecting that said dealer was carrying defendants' product and not plaintiff's; and that defendants do not advertise their goods at all, and do not place any signs bearing the word "Koke" in conspicuous places about soda fountains and soft drink stands where their goods are sold, for fear that the public, on seeing the word "Koke" printed in the alleged deceptive style of type referred to, upon said signs and advertisements, will thereby at once detect that the establishment carries "Koke" instead of "Coca-Cola", and thus be led to shun it.

If this were not enough in itself to convince anyone that there is no deceptive similarity between the word "Koke" and the words "Coca-Cola", then the evidence of plaintiff's own witnesses upon this point, which is set

out in Schedule 1, Vol. 2, ought to remove all doubt on the subject.

In *Coca-Cola Co. v. Glee-Nol Bottling Co.*, 221 Fed., 61, ("C. C. A."-5), plaintiff sought to enjoin the use of the word "Glee-Nol", printed in a style of script like that in which plaintiff prints the words "Coca-Cola" as an infringement of its alleged trade-mark, and as an unfair competition. "Glee-Nol" was a beverage having the same color and taste as plaintiff's product, and was sold in bottles of the same size, color and shape, having caps and crowns of the same general design.

In disposing of the question raised by the defendant's use of script type of the word "Glee-Nol", the Court said:

> "And it was not made to appear that the use by the defendant company of the same style of script as that used for the name 'Coca-Cola' on the bottles containing it resulted in there being any resemblance between the two names as they were respectively displayed other than such as exists between two written or printed words which are wholly different, except in so far as a letter or letters common to both are alike."

The decree of the court below, which dismissed the bill, was affirmed.

But it is said that it is not so much the *appearance* of the word "Koke", that is complained of as its *sound* when spoken. It is said that, the sound being the same as the sound of the first syllable of the word "Coca"—namely, the sound "*coc*",—its use amounts to an appropriation of a part of plaintiff's alleged trade-mark, and is an abbreviation of it in sound. Suppose it is an

abbreviation of the word "Coca", and suppose it has identically the same sound; what right has the plaintiff to complain, unless it deceptively resembles the whole name,—the combination, "Coca-Cola"? Plaintiff's trade-mark rights, if it has any, are in the combination, "Coca-Cola" and not in either the word "Coca" or the word "Cola" considered by itself. Unless plaintiff can show an exclusive right to the word "Coca", it certainly cannot complain of defendants' use of an abbreviation of that word, or of a word having a sound resembling the first syllable thereof.

Finally, it is said that the significance of the word "Koke" is the same as that of the words "Coca-Cola" and not in either the word "Coca" or the word "Cola", by itself.

It is true that the word *"coke"*, which may be taken to be the same word as *"Koke"*, means "cocaine", and that cocaine is derived from coca and is its active constituent. But, here, again, the alleged infringement is not of the *combination*, but only of a *publici juris* element of that combination. Besides, even if "coke" had the same significance as the two words, "Coca-Cola", coupled together which obviously it has not, still plaintiff could not complain, because the significance here involved would be nothing more than the *primary descriptive significance* of any drink supposed to contain cocaine.

Without regard to the defendants proof as to infringement, the admissions of the following witnesses on behalf of plaintiff show that as a practical matter, "Koke", as used, is not deceptively similar to plaintiff's trade-mark:

DAVE S. BAUER, a retail druggist, Mobile, Ala.:

"I had given instructions to my soda dispensers to make inquiry of purchasers who asked for 'dope' and 'coke' if they wanted 'Coca-Cola'. When they say 'Give me just what we ask for', we say, 'Well, we do not carry anything but Coca-Cola'. In a good many instances they said, 'Look here, I did not come in here to be jollied. I came in here to get what I want'. The dispensers would then say, 'We just don't serve anything else but 'Coca-Cola', and this card would be shown to the purchaser, and in a majority of cases the fellows would just tell what they wanted.' The card referred to is the one marked *plaintiff's exhibit 100.* Of course, I watched this pretty close to see what effect it would have on my business, and visited my soda fountain more often than usual, and whenever I seen that card shown them, without one exception I heard the reply, 'Say, I want Coca-Cola'. *I did not know there was two drinks. I did not know there was another one like that.*" (Rec., 537).

JOHN CAIN, a hired spotter for the Coca-Cola Company:

"The way I know they handled it ('Koke') is because Mr. Rausch told me that he handled it. He told me that that day I went down there. He has got a bottle down there that you can see it—it is a syrup bottle, a bottle of syrup. It's syrup up there 'K-O-K-E'—as big as life. * * *" (Rec., 626).

GEORGE H. WILKINS, the private detective in the employ of Messrs. Read & Rogers, attorneys for the Coca-Cola Company, Chicago:

"You ask if I know that as soon as I saw the crown; to the best of my knowledge it would not be 'Coca-Cola' with a 'Koke' crown. * * * No, I

do not mean to tell you that that looks anything like 'Coca-Cola' to me, because I have handled too many of them. *I do not believe it did look like 'Coca-Cola' the first time I saw it.*" (Rec., 887).

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tennessee, who formerly bottled a product which he labeled "Koke" in the identical style of type as that used by defendants:

"Q. Mr. Huggins, did you consider that your trade-mark 'Koke' so nearly resembled the trade-mark 'Coca-Cola' as to be likely to cause confusion in trade, or to deceive purchasers? A. I do not think that there was but very little resemblance in the forming of the two words,—in the formation of the two names.

"Q. Well, did you think there was *any* resemblance between them in *sound, appearance* or *suggestion?* A. *No, sir; not between 'Coca-Cola' and 'Koke'.*

"Q. You consider them *entirely different words?* A. *I consider them entirely different words.*

"Q. Not only in the *appearance,* but in the *sound* of them? A. *Yes, sir.*

"Q. And in their *significance?* A. *Yes, sir.*" (Rec., 2019-2020).

S. B. CHRISTY, the partner of J. W. Huggins in the "Coca-Cola" bottling business at Murfreesboro, Tennessee, and who was formerly the partner of Huggins when he bottled the product "Koke":

"Q. Did you think you had a right to put this name 'Koke' on there? A. The Government thought so.

"Q. Didn't you know this name 'Koke',—anybody looking at it would right off think it was *'Coca-Cola'?* A. *No, sir.*" * * *

"Q. Did you know that the appearance of that

word, 'Koke', as it is written on that label marked *Defendants' Exhibit No. 24*, looks so much like 'Coca-Cola' that you cannot tell the difference? A. *No.*

"Q. You mean to say it looks *different* from 'Coca-Cola'? A. *Yes.*

"Q. You mean to say that *any body can tell the difference right off?* A. *Anybody that could read, they could.*

"Q But, as a matter of fact, however, it *sounds* just like the four syllable name 'Coca-Cola', don't it? A. *No.*

"Q. Do you think *anybody could tell the difference in sound* between the word 'Koke' and the word 'Coca-Cola'? A. *Yes,* (Rec., 2030-2031). * * * Q. Don't you know, Mr. Christy, that you adopted that name 'Koke' for the sole and only purpose of enabling you to substitute your beverage for 'Coca-Cola' and pass it off to the public and fool them and make them think it was 'Coca-Cola'? A. No, we did not try to fool them that it was 'Coca-Cola', because *they knew it was not 'Coca-Cola'.* Q. *How* did they *know that it was not 'Coca-Cola'*? A. We advertised it as *'Koke'."* (Rec., 2032-2033).

H. B. PIERCE, the chief detective for the Coca-Cola Co. in charge of working up the facts in this case:

"Q. Does the name 'Dope' as it appears on the caps of the defendants' bottles, look like the name 'Coca-Cola'? A. *Only the script or style of letter* used. * * * Q. Do you think you would mistake *that* for the name *'Coca-Cola'* on the crown of the bottle? A. Not I, *I would not.* Q. Do you think *anybody would?* A. They may; I do not know.

Q. Do you think *any rational being, anybody with common sense would?* A. I do not know. (Mr. Hirsch: I object to that. *He* don't know what a *rational being with common sense* would do). Q. Would you mistake the (word) 'Koke' written in (script on the) caps on defendants' bot-

tles for the name 'Coca-Cola'? A. No." (Rec., 2137).

FREDERICK CONWAY PEACE, an ex-Pinkerton detective in the employ of the Coca-Cola Company to work up the facts in this case:

"You ask if I have seen the bottled 'Koke' or 'Dope' put out by bottlers; yes, sir, but not in Dallas, I saw them down in Mississippi. Yes, sir; the crown was on them. Yes, sir; I have also seen the bottled goods sold at various places with the name 'Dope' on the crown—it would not be anywhere else on the bottle. It was not blown in the glass, and *when the crown was pulled off* and the consumer had got the bottle, *he could not tell what was in the bottle; it would not be labeled* then." (Rec., 2216).

"KOKE" AND "DOPE". NOT "ABBREVIATIONS" OF COCA-COLA NOR DO THEY DESIGNATE PLAINTIFF'S PRODUCT EXCLUSIVELY.

The words "Koke" or "Coke" and "Dope" are simply commonly used nick names for a large class of drinks, popularly known as "Colas", offered to the public both as beverages and as headache remedies and as nerve tonics and which formerly contained or were supposed to contain, cocaine.[13]

[13]REPORTS OF THE PRESIDENT'S HOMES COMMISSION. Washington, D. C., 1908, pp. 268-270—Soft Drinks Containing Caffeine and Extracts of Coca Leaf and Kola Nut. (By Lyman F. Kebler, M., D., Ph. D., Chief Division of Drugs, U. S. Department of Agriculture).

"During the past decade soda-fountain specialties containing caffeine, extract of kola nut and extract of coca leaf, **the active principle of which is cocaine,** have been offered in considerable quantities and, due to extensive and attractive advertising, both as beverages and **as headache remedies and nerve tonics,** their sale has assumed large proportions.

The first appearance of preparations of this type was in the South in the eighties, their introduction following the success which Moxie had attained in the East, though this particular drink was of an entirely different character. From the South the demand spread to other sections and the number of products has increased until at the present time there are **probably over one hundred of them** bottled and sold all over the United States. The greatest demand is still in the South, however, and almost every drug store, confectionery shop, and fruit stand has its favorite product on sale. The carbonated goods in bottled form are offered on the trains. People of all classes, young and old, delicate women and even little children consume these beverages indiscriminately and no warning is ever given of the baneful effect of the powerful habit-forming drugs concealed therein. It is therefore small wonder that the prevalence of the so-called 'coca-cola fiend' is becoming a matter of great importance and concern. ***

Judging from the names of most of these products it would appear that extract of kola nut is one of the chief ingredients, and, while in certain instances this drug is undoubtedly present, in most cases the caffeine has been added as the alkaloid caffeine obtained from the refuse tea sweepings or made artificially from uric acid occurring in the Guano deposits of South America, or in the citrated form, and the sirup colored with caramel. **The cocaine found is usually added in the form of extract of coca leaf.**

*** An investigation of these products was undertaken about a year ago and it was found that the following products contained both caffeine and **extract of coca leaf:**

Afri Cola, The Afri Cola Co., Atlanta, Ga.
Ala Cola, Ala Bottling Works, Bessemer, Ala.
Cafe Coca, Athens Bottling Works, Athens, Ga.
Carre Cola, E. Carre Co., Mobile, Ala.
Celery Cola, The Celery Cola Co., Birmingham, Ala; Dallas, Tex.; Nashville, Tenn., and St. Louis, Mo.
Chan Ola, L. M. Channel, New Orleans, La.
Chera Cola, Union Bottling Works, Columbus, Ga.
Coca Beta, The Coca Beta Co., New York City.
Coca Beta, Southern California Supply Co., Los Angeles, Cal.
Coca Cola, Coca Cola Co., Atlanta, Ga.
Pilsbury's Coke, A. L. Pilsbury, Jr., Co., New Orleans, La.
Cola Coke, Lehman-Rosenfield Co., Cincinnati, Ohio. (This preparation was formerly sold under the name of Rocco Cola.)
Cream Cola, Jebeles & Calias Co., Birmingham, Ala.
Dope, Rainbow Bottling Co., Atlanta, Ga.
Four Kola, Big Four Bottling Works, Waco, Tex.
Hayo Kola, Hayo Kola Co., Norfolk, Va.
Heck's Cola, Heck & Co., Nashville, Tenn.
Kaye Ola, A. W. Kaye, Meridian, Miss.
Koca Nola, Koca Nola Co., Atlanta, Ga.
Koke, Coleman & McKeever, Frankfort, Ky.
Kola Ade, Wiley Manufacturing Co., Atlanta, Ga.
Kola Kola, W. J. Stange Co., Chicago, Ill.
Kola Phos, John Wyeth & Bro., Philadelphia, Pa.
Koloko, Halberg Bottling Works, Mobile, Ala.
Kos Kola, Sethness Co., Chicago, Ill.
Lime Cola, Alabama Grocery Co., Birmingham, Ala.
Lima Ola, Wine Brew Co., Macon, Ga.
Mellow Nip, Rainbow Bottling Co., Atlanta, Ga.
Nerv Ola, Henry K. Wampole & Co., Philadelphia, Pa.
Revive Ola, O. L. Gregory Vinegar Co., Birmingham, Ala.
Rocola, American Manufacturing Co., Savannah, Ga.
Rye Ola, Rye Ola Co., Birmingham, Ala.

"Coca" formed a part of the names of a number of these drinks, as, in the cases of "Coca", "My-Coca", "Coca-Lulu", "Cafe-Coca", "Coca Beta", "Coca Ginger", "Koka Ale", "Koca-Nola", and "Coca-Cola".

Several of these drinks were found to contain cocaine as in the cases of Celery Cola (Rec., 1601-2), Koca-Nola, Cafe Coca, Kos Kola, Kola-Ade, Roca Cola, WiseOla and Soda Water Syrup Cola.[14] Prosecutions and con-

Standard Cola, The Standard Bottling Co., Denver, Colo.
Toka Tona, California Commercial Co., Los Angeles, Cal.
Tokola, Samuel Smith & Co., Chicago, Ill.
Vani Kola, Vani Kola Company, Canton, Ohio.
Vim-O, Vim-O Company, Eagle Lake, Tex.
French Wine of Coca, Wine of Coca Co., Boston, Mass.
Wise Ola, The Wise Ola Co., Birmingham, Ala. ***

Besides the above preparations which have been analyzed a number were reported from different parts of the country but no samples were submitted. From their names, and from what evidence there was submitted they contain either caffeine or coca leaf extract, or both:

Charcola, H. C. Metzger, Meridian, Miss.
Cola Soda, Jacob House & Sons, Buffalo, N. Y.
Cherry Kola, Williamsport, Pa.
Coca Ginger, National Beverage Co., Atlanta, and Chattanooga.
Field's Cola, H. C. Field, High Point, N. C.
Imported French Cola, Alabama Grocery Co., Birmingtam, Ala. (Claimed to be carbonated Wiseola).
Jacob's Kola, Tampa, Florida.
Koko Ale, Salt Lake City Soda Water Co., Salt Lake City.
Kola Cream, The Henzerling Co., Baltimore, Md.
Kola Pepsin Celery Wine Tonic, W. J. Miller, Cleveland, Ohio.
Kola Vena.
Loco Kola, Norton, Va.
Mintola, Davis Kelley Co., Louisville, Ky.
Mate, Mississippi Ice Co., Clarksdale, Miss.
Pikmeup, Scales, Wilson Co., Greenville, S. C.
Ro-Cola, Savannah, Ga.
Schelhorns Cola, Evansville Bottling Co., Evansville, Ind.
Vine Cola, California Commercial Co., Los Angeles, Cal.
Viz, Alabama Grocery Co., Birmingham, Ala. (Claimed to be carbonated Wiseola)."

[14]Notices of Judgments, Food and Drugs Act, U. S. Department of Agriculture, No. 202, (I. S. Nos., 19577-a and 8094-a; F. & D. Nos., 613 and 700 issued March 16, 1910); No. 235, (I. S. No. 8091-a; F. & D. No. 591 issued March 28, 1910); No. 296, (I. S. Nos. 19578-a and 9103-a; F. & D. Nos. 701 and 651 issued May 21, 1910); No. 310, (I. S. No. 24213-a; F. & D. No. 1043 issued May 26, 1910); No. 466, (I. S. No. 8704-b; F. & D. No. 1241, issued August 8, 1910); No. 594, (F. & D. No. 586; I. S. No. 8092-a. Issued October 13, 1910); and No. 1031, (F. & D. No. 1172; I. S. No. 5421-b, issued August 30, 1911).

victions followed doubtless with unpleasant notoriety and "Coke", the slang name for cocaine and "Dope" the slang name for drugs of which cocaine is perhaps the best known example, became fixed in the public mind as nick-names for these drinks which had taken the place of the cocaine preparations formerly sold as "Coca-Wine", "French Wine Coca", Etc. (Rec., 655-6).

To have a monopoly on the right to sell cola upon calls for it by either or both of the slang names "Coke" or "Dope" would naturally be a business asset of incalculable value and the finding of the District Court to the contrary notwithstanding, Mayfield, the predecessors of the Koke Company had, in fact, used "Koke" as a trade name for a soft drink in 1888 and for at least fifteen years thereafter.[15]

[15] "That the Pemberton Medicine Company of Atlanta, Georgia, made and sold, during the period from 1888 to 1898, in containers bearing the label "Koke", a product which was used in the making of a soda fountain beverage, held to be established. **This ruling** is in no manner dependent upon the testimony of Mayfield himself. It is based upon the testimony of several competent witnesses including one of the original partners, Murphy, (Applicant's Rec., p. 393); a daughter and a son in law of another of the original partners (Banks, Applicant's Rec., pp. 516, 525; Miss Marian Bloodworth, Applicant's Rec., pp. 347, 351, 356, 357) and a friend who visited Mayfield from Alabama about 1892 or 1893 (Holley, Applicant's Rec., pp. 373, 374). **These witnesses have not been impeached and there is no apparent reason why their testimony should not be accepted as true.**

Evidence has been introduced in behalf of the applicant which is believed to warrant the conclusion that Mayfield continued to make and sell a beverage of some kind under the name "Koke" for a short period at least after he left Atlanta. McGraw, an Alabama bottler, testified (Applicant's Rec., pp. 421, 423) that he has bottled Koke purchased from Mayfield "off and on" (Applicant's Rec., p. 422) ever since about the year 1900. He admitted that he had lost track of Mayfield at times and has been unable to get the product for periods of time, the extent of which is more or less uncertain. **He testified however, that he bottled and sold Koke during the years 1900, 1901, and 1902, and gave a list of several of his customers** (Applicant's Rec., pp. 432, 433). **It would seem that his testimony as to sales of Koke in 1901, 1902, and 1903, might have been rebutted if not true.**

It is the opposer's contention that Mayfield and the companies in which he was interested, used the name "Koke" for the first time, after the government prosecution, in 1909, with respect to the misbranding of Celery-Cola. It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word "Koke" as a name for a soda fountain beverage during the period from 1888 to 1903, after which Mayfield

Registrations on "Koke" and on "Dope" as trademarks for soft drinks were purchased, and the Koke Company of America, on the strength of these registrations and long use of "Koke", announced in no uncertain terms that its drinks "Koke" and "Dope" must be supplied upon calls for "Koke" and "Dope" or the seller would be guilty of infringement. It was a good scheme from a business standpoint, but the plaintiff quite naturally objected to the good will of the class of drinks of which Coca-Cola is the most widely known example, being thus gobbled up. But, if plaintiff must bring suit, why not try to procure by the aid of a court decree, the very monopoly which the Koke Company, on the strength of their registrations was trying for? *This, in a nut shell, is exactly what plaintiff is trying to accomplish.*

COLAS (ALSO SPELLED KOLAS) CONSTITUTE A LARGE AND WELL DEFINED CLASS OF DRINK.

"Kola, ko'la, **n,** an African tree whose nuts or seeds have stimulant properties; hence, **a name given to a beverage made from such nuts or seeds.** ((American Dictionary, P. F. Collier & Son, New York, 1910).

In *Seth A. Fowle, et al. v. Miner's Fruit Nectar Co.,* (Appendix No. 4, Vol. 2.) United States Circuit Court, District of Massachusetts, in a decision, an exemplified copy of which is set out in Appendix No. 4, Vol. 2, Judge Brown said:

> There is evidence from both complainants and respondent to the effect that the term "cola" has

became most active in his efforts to promote Celery-Cola, but that any trade-mark right which may have been acquired during that period prior to 1903 was clearly abandoned during the following period from 1903 to 1909. Such abandonment of any prior use which may have been made is held to be satisfactorily established by the evidence." (Exhibit E, Appendix to Petition for Certiorari, pp. 70 and 76).

been commonly used in a two-word descriptive name for beverages to indicate the presence of cola nuts as an ingredient. There is testimony as to the use of the following words: Pepsi-Cola, Pensi-Cola, Star-Cola, Afri-Cola, Lime Juice and Cola, Frugo-Cola, Vani-Cola, Cola Syrup, Hecks-Cola, Kola-Ade, Wine-Kola, New Cola, Lon-Cola, Celery-Cola, Phos-Cola, Laxa-Cola.

Upon the proofs presented, I am of the opinion that the complainant has failed to show that by the use of the word "cola" in combination with other descriptive terms, there is any violation of complainants' rights. The defendant appears to have a right to manufacture what the complainants term a "cola beverage", using the term in a broad way to indicate a beverage having "cola" as an ingredient.

In *The Coca-Cola Company v. Williamsburg Stopper Company et al.*, 2 T. M. Rep., 234, Judge Hough said:

> "Co" is admittedly a descriptive word in which complainant is entitled to no special or exclusive right. **
>
> As applied to this case, I think that not only were Cola drinks open to the world, but brown Cola drinks were similarly open, or in other words, that the unpatented article made by complainant is a *thing* (color and all) which anyone can make and vend in competition with complainant, and ought to be permitted so to do.

The United States Circuit Court of Appeals for the Sixth Circuit, in *Coca-Cola Co. v. Gayola Co.*, 211 Fed., 942, recognized that cola is a well defined type of beverage and authorized the use by the defendant company of the words "The Improved Cola" on its bottles.

The Patent Office recognizes cola as a definite type of beverage, and accepts "Cola" as the generic name of

such type as shown by trade-mark registrations, certified copies of which are set out in Appendix No. 5, Vol. 2. The pertinent parts of the statements of such registrations are as follows:

> "Registration No. 91,320. The particular description of goods to which the trade-mark is appropriated is ginger-ale, lime smash, orangade, root beer, limeade, cherry, *cola*, flavoring extacts for nonalcoholic beverages, grape juice, lemon soda, and concentrated syrups for making nonalcoholic beverages in Class 45, Beverages, nonalcoholic."
>
> "Registration No. 96,119. The particulr description of goods to which said trade-mar is appropriated is ginger-ale, sarsaparilla, birch beer, root beer, lemon soda, strawberry soda and *cola*, in Class 45, Beverages, nonalcoholic."
>
> "Registration No. 107,599.*** in the accompanying drawing for nonalcoholic carbonated everages and syrups used in the making of the same, namely, nectar compound, fruit syrups, apple-cider maker, non-alcoholic coffee-liqueur, vegetable flvors, fruit extracts, *cola* extract, in Class 45, Bevrages, nonalcoholic."

The testimony herein shows that the public recognize that the beverages to which those of the parties belong is a large and well defined class of drink

W. H. SIDEBOTTOM:

> "There are now a great many cola drinks on the market; the Celery-Cola, Star-Ca, Cola-Ade. I have known of cola drinks on the market to my best recollection twenty-five or twenty-eight years, I guess." (Rec., 1163).

W. M. POLLOCK:

> "I have heard of—I guess about 40 or 50, some-

thing like that, different cola drinks." (Rec., 1199).

J. C. PRICE:

"There are many different brands of cola drinks I have served, I could not call them all now, I know a few, Arrow-Cola, J. D. F. Cola, Koke and Cola, Gay-Ola, Afri-Cola, and I have dispensed Star-Cola and Gerst's Cola, too." (Rec., 1205).

E. A. SHARP:

"We handled Koke, and Dope, Coca-Cola, and Brain-Ol, that is about all the cola drinks we have. *** We used to sell a cola, the Rock Cola, and Gay-Ola, and Brain-Ol." (Rec., 1253).

"Every man in my town has always handled three or four different kinds of cola drinks, and I have had it on the fountain." (Rec., 1254).

GEO. R. EDMONDSON:

"If a man comes into the store and asks for a Dope, I think he wants a cola." (Rec., 1300).

W. A. HICKMAN:

"Asked what kind of drink you want. They say I don't know, anything, what kind of cola do you sell here?" (Rec., 1823).

Other testimony to the same effect:

D. S. BAUER, (Rec., 541).
A. F. ENSINGER, (Rec., 985).
C. P. EMBREY, (Rec., 1019).
DR. H. O. NULL, (Rec., 1063-4).
ADAM DIEHL, (Rec., 1085).
W. F. DAVIS, (Rec., 1102).

J. E. DUNN, (Rec., 1158).
F. C. DORIDER, (Rec., 1195).
LEE HAGAN, (Rec., 1292).
C. W. BURTON, (Rec., 1322).
A. S. JOSEPH, (Rec., 1331).

Among the different brands of cola disclosed in the record are, "Afri-Kola", "Ala-Cola", "Ameri-Cola", "Arrow-Cola", "Call's Cola", "Candy-Cola", "Carre Cola", "Celery-Cola", "Chas Cola", "Chero-Cola", "Child's Cola", "Coca-Cola", "Coca-Nola", "Cola-Nip", "Cola-Queen", "Dope", "Eps Cola", "Espo-Cola", "Farri-Cola", "Fletcher's Cola", "Ga.Gola", "Gay-Ola", "Gerst's Cola", "Gibb's Cola", "Glee-Ola", "Haskels Cola", "Hay-O-Cola", "It's-A-Cola", "J. D. F. Cola", "Joy Ola", "Koke", "Kola-Ade", "Kola-Rex", "Lemon-Cola", "Lime-Cola", "Luck-Ola", "Mar-Cola", "Mayfield's Cola", "Mays-Ola", "Maud-Muller", "Mint-Cola", "Miola", "Miss-Ola", "Mo-Cola", "Murphy's Cola", "My-Coca", "Matthews' Cola", "Misti-Cola", "Nifty-Cola", "Niger-Cola", "Nerve-Ola", "Nova-Cola", "Orin-Cola", "Pepsi-Cola", "Pepsin-Ola", "Queen-Ola", "Rivo-Cola", "Rock Cola", "Roxie-Cola", "Rye-Ola", "Sheer-A-Cola", "Star-Cola", "Tenn-Cola", "Texa-Cola", "Tru-Cola", "Wine-Cola", "Wise-Ola", "Zero-Cola".

COLAS GENERALLY SUPPOSED TO CONTAIN A STIMULATING OR NARCOTIC DRUG, AS COCAINE.

C. P. EMBREY, a druggist of Chattanooga:

> "The way I look at it, it has been in litigation that Coca-Cola or any of those *dope* products are injurious to you, you see, and then people just got the

idea that drinking in excess would injure, that is the way the public would think whether it is true or not." (Rec., 1020).

F. M. BOGART, a druggist:

"In making known to me the different cola drinks they want, some say 'Give me a Dope', 'A shot in the arm', 'Shoot me'. I understand when they ask for those names *they want some stimulating drink.*" (Rec., 1070).

JOHN PARDUE, assistant manager of a soda fountain in Nashville:

"I have heard of cocaine in regard to Coca-Cola and Fletcher's Cola and all of them. I have heard it in the last three or four years." (Rec., 1139).

F. C. DORIDER, a confectioner and restaurant proprietor, of Nashville:

"The word 'Dope' means, well, I suppose the Cola people are supposed to give people the impression that they put cocaine in it, and I think the word 'Dope" came from that; I don't know whether the rest of them did or not, but I always thought they did." (Rec., 1197).

A. S. JOSEPH, a dispenser of various soft drinks:

"I think the advertising that the public has got out of the newspapers at various times when these suits were brought kind of educated them along the lines of what they (Cola drinks) contain, or at least gave them the impression that all these *dope drinks contained some kind of dope or coke on the order of a narcotic,* and they would come in and say, give me a dope or a coke, under the impression that they are going to get some percentage of *narcotic.*" (Rec., 1332).

J. E. DUNN, (Rec., 1158).
F. C. DORIDER, (Rec., 1195).
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J. W. HUGGINS, a bottler:

> "Yes, I have understood that these cola drinks had some kind of drug in it, of that kind, some kind of narcotic. Yes, sir, I have heard it said that they had *cocaine* in them." (Rec., 2018-19).

INHERENTLY IMPROBABLE THAT "DOPE" AND "KOKE" ARE APPLIED TO ONE MEMBER ONLY OF THE COLA FAMILY.

There was a good reason, as indicated, why the nick-names of narcotic drugs and the nick-name of cocaine should be used as slang for colas. In fact, a contention that "Dope" and "Coke" is a slang name for only one of a class of drinks which are supposed to contain what the public commonly terms "Dope" and "Coke" is inherently improbable.

CHARACTER OF PROOF REQUIRED TO ESTABLISH A SECONDARY MEANING OF DESCRIPTIVE WORDS.

The leading case is that of *Cellular Clothing Co. v. Maxton & Murray*, which was finally decided in the House of Lords.

In the Court of Sessions, in Scotland, 15 R. P. C., 602, Lord Kyllachy, the Lord Ordinary, said in part:

> "'It may be', to use Lord Herchell's words in the case of *Reddaway v. Branham*, 'capable of proof that the use of such (descriptive) words, by themselves and without explanation or qualifications, has the effect, in particular circumstances, of deceiving purchasers into the belief that they are getting the goods of A, while they are really getting

the goods of B.' That is the point,—and, I rather think, the only point,—decided in the case of *Reddaway*. But while such proof is possible, the difficulty of proof is necessarily great. For prima facie, *it is scarcely credible that* (putting aside the special conditions of the foreign markets) men of business will be found *to suppose that a manufacture that has taken the market, and is unprotected by patent, can long continue to be produced by a single firm; or fail to know that a manufacture described merely by character and quality is as likely to be the product of one firm as of another.* Witnesses may no doubt be found to say the contrary,—to say that they would or might have so believed. But the question is, would they really have done so, or been likely to do so, if brought to the test? And one is apt to be skeptical about general statements of that kind.***

"There can be no doubt that the word 'Cellular' is an ordinary English word. It is to be found in all dictionaries, and is part of the common stock of language. It is quite commonly applied to describe a certain structure of the natural substance, and, prima facie, it is equally open to describe a certain texture of woven goods. It is said, however, that, as applied to cloth, it was in fact a term new and peculiar; and, in a sense, that is no doubt true.***

"Now, this being so,—the name being simply descriptive,—it is, as I have already stated, *extremely difficult to appropriate such a name by attaching to it a secondary and restricted sense* which shall make it, not a descriptive name, but a name for the goods of some particular maker. Still, this is, as has been held, possible; I must, therefore, consider the evidence by which the Pursuers propose to establish the transformation that they allege.

"That evidence may be said to be of two kinds. In the first place, there are adduced a number of witnesses engaged in the soft goods trade who state generally what they understand and what they understand the trade to understand, by the words 'Celluar Cloth'. I have nothing to say against that

evidence. It is largely made up of the testimony of persons who are the Pursuers' agents or are in some way connected with them. But it is not met by counter evidence; and it is probably as reliable as such evidence usually is. All I need say about it is that it did not make much impression on my mind.

"The Pursuers have, also, however, proved certain facts, and, in particular, these: (1) That although prior to 1888 goods were in the market to which the adjective 'Cellular' might, without violence, have been applied, the word was not in fact so applied but was first applied by the Pursuers in or about that year. ***

"Now, I do not say that there is not here a case that requires to be considered, but for the purpose of the present action it appears to me to fall short of what is required, and to do so especially for two reasons. In the first place, it has to be noted that the case which the Pursuers make, and must make, against the present Defenders is a case of indirect misrepresentation, i. e., misrepresentation to the general public through the retail shop keepers. *** The alleged deception is, therefore, as I have stated, deception of the general public,—the customers of the retail shops; and, that being so, the difficulty as it seems to me, is that, so far as I can discover, *there is no evidence which goes to show that among the general public the word 'Cellular' has in fact acquired any secondary or special meaning.* I may be wrong, but I can find no evidence that the average customer who asks for, or is shown, cellular shirts or cellular cloth, knows, or for that matter cares, by whom the material has been made or put into the market. It is true that by the Pursuers' advertisements their 'Cellular' cloth is extensively advertised, and advertised as only obtainable wholesale from the Pursuers' Company; and, no doubt, there are persons who read these advertisements, and who accept their statements, and who, therefore, associate all 'Cellular' cloth with Pursuers.

There are probably, also, persons (perhaps more numerous) who assume that an article so advertised is a patented article and can only be produced by the patentees. And again, there are, I dare say, others who, knowing or recollecting nothing of the Pursuers' name, assume generally that an article advertised is produced by the advertisers. The question, however, is not as to isolated persons who draw undue inferences, or even as to the class of persons who read and are impressed by advertisements. The question is as to the general public. And as to them, all I can say is that, sitting here as jury, I am not able to hold it proved that, either in England or Scotland, the public recognize the word 'Cellular' as denoting the Pursuers' goods. ***"

On appeal to the Inner House (15 R. P. C., 610), the judgment was affirmed. Finally, an appeal was taken to the House of Lords (*Cellular Clothing Co. v. Maxton & Murray*, L. R., (1899) A. C., 326; 68 L. J. P. C., 72; 80 L. T. Rep., N. S., 809; 16 R. P. C., 397), where the judgments of both lower courts were affirmed.

Lord Shand (16 R. P. C., 406):

"*** A totally different principle must be applied in the case of goods which are sold under a merely descriptive name. If a person employing a word or term of well known signification and in ordinary use, though he is not able to obtain a patent for his manufacture, and although he has not got the protection of a registered trade-mark for the goods he is proposing to sell, is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of the descriptive term, he would really acquire a right much more valuable than either a patent or a trade-mark; for he and his successors in business would gain the exclusive right, not for a limited time, as in the case of a

patent, but for all time coming, to use the words as applicable to goods which others may be desirous of manufacturing, and are entitled to manufacture and sell as much as he is. That being so, *it appears to me that the utmost difficulty should be put in the way of anyone who seeks to adopt and use exclusively as his own, a merely descriptive term.*

"My Lords, the case on which the Appellants have chiefly relied is that of the *'camel hair belting'* —the case of *Reddaway*. Of that case I shall only say that it no doubt shows that it is possible, where a descriptive name has been used, to prove that so general,—I should say so universal,—has been the use of it as to give it a secondary meaning, and so to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify that use by some distinguished characteristic. But I confess I have thought,—and I still think,—that it should be made *almost impossible* for any one to obtain the exclusive right to the use of a word or term which in ordinary use in our language and which is descriptive only; and, indeed, were it not for the decision in *Reddaway's* case, I should say this should be made altogether impossible. ***

"As to the proof itself, I have only this to say: It must not be forgotten that it is on the Pursuers that the onus lies in seeking to appropriate as their own a descriptive word such as the word 'Cellular'. It is for the Pursuers to show that in Scotland the term has acquired with the trade and with the public the signification they seek to attach to it. We have a large body of evidence for the Defenders to the effect that nothing of the kind has occurred. *** Taking the evidence as a whole, and keeping in view the onus is on the Pursuers to establish by proofs that a special secondary meaning has been attached to the word 'Cellular', I am clearly of the opinion that they have failed to make out their case."

Lord Davey, (page 409):

"The other observation which occurs to me is this: That where a man produces, or invents, if you please, a new article, and attaches a descriptive name to it,—a name which, as the article has not been produced before, has, of course, not been used in connection with the article,—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds, and is associated by them with, the Plaintiff's goods alone, is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time his monopoly lasted, and, therefore, there was nothing to compare with it and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the Plaintiff.***"

"My Lords, the second class of proof is that of the witnesses who say in effect this (I will take one of the best, and I think, one of the earliest witnesses,—Mr. Henley): 'If I heard any one in the trade speak of "cellular" goods I would understand that he meant the product of the Cellular Clothing Co.' Well, My Lords, so long as the Cellular Clothing Company were the only company making cellular goods, that would not be astonishing, and, so long as they retain the monopoly, no doubt that might be the case; but, as I have already said in speaking of the proposition generally, this is very slender evidence upon which to found the superstructure which the Pursuers' counsel endeavored to erect upon it, and, indeed, *unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods, there is nothing to compare it with and they are merely stating a fact.*"

Burberry's v. J. C. Cording & Co., 26 R. P. C., 700

(High Court of Justice, Ch. D., Sept. 28th, 1909), Parker, J.:

> "When a witness says that he knows the word 'Slip-on' as meaning not only a particular kind of coat but the coat of a particular manufacturer, it is material to know whether he is acquainted with the article as made by any one else. *If he is not, the word, however it may be associated in his mind with the particular manufacturer, is not really to him a distinctive word.* The danger of relying too much on what is said by persons in this position is well illustrated by the evidence of Mr. Kelson, the editor, or former editor of 'Sporting Celebrities'.—(Q) Speaking from your wide experience, what does the word "Slip-on" mean amongst that section of the public with whom you are brought in contact? (A) It is a weather-proof coat made by Burberry's. (Q) Does "Slip-on" give you an idea of the kind of garment it is? (A) It is a water-proof gabardine. (Q) What is its characteristic shape, if it has any? (A) It is a kind of cloak with sleeves. (Q) Is it loose? (A) Yes. (Q) Has it a characteristic shape? (A) No, I do not think it has any characteristic shape. I could tell one if I saw it across the room.' Later he said: 'If I saw a gentleman in the street coming along with a "Slip-on" I should recognize it.' It is quite clear from this that Mr. Kelson knows a 'Slip-on' only as a particular kind of coat, and that, to him, the additional fact of its being a coat of Burberry's manufacture is an inference from his knowledge that Burberry makes this particular sort of coat. He knows nothing of similar coats made by other manufacturers. I think Mr. Kelson's evidence the more important because he belongs to that class of the public who buys 'Slip-on' coats and is in no way connected with the trade. ***
>
> "Mr. Lemon, of Lemon & Sons, sells nothing made of chemically rain-proof material except the Plaintiff's goods. He knows the word 'Slip-on' only in connection with Plaintiff's goods and supplies

such goods if asked for 'Slip-ons'. If he saw the word 'Kathador-Slip-on', without more, he would think it a 'Slip-on' of Burberry's manufacture. He would not be deceived by the expression 'Cording's-Slip-on' for 'Slip-on' to him describes a particular sort of garment; but he thinks the public might be deceived into thinking one was selling garments made by Burberry's. ***

"I have given sufficient illustration to show the nature of the trade evidence adduced on the Plaintiff's behalf. I think it evident that a great number of traders in all parts of the country consider, when asked for a 'Slip-on' that a Burberry's coat is meant, and supply a Burberry's coat accordingly. At the same time a 'Slip-on' is to them a coat of a particular cut and material, so that if they were asked to make a 'Slip-on' themselves they could readily do so without further instructions as to cut or material. They would not, I conclude, be deceived by anything the Defendants have done. ***

"If other traders wish to meet the popular demand or the kind of article primarily denoted by the word 'Slip-on' they are at liberty to do so, and, to grant an injunction restraining them from using the term by which the article is known, would, unless there is strong evidence that such use would be calculated to deceive by reason of some secondary meaning of the word, be, in my opinion, an undue interference with trade, and tend towards establishing a monopoly."

Bile Bean Manufacturing Company v. Davidson, 23 R. P. C., 725-732:

"The Complainers must prove that 'Bile Bean' is capable of denoting only the pills sold by them and no others. *(John Dewar & Sons, Ld. v. J. H. Dewar*, 17 R. P. C., 341). Here no evidence at all has been brought of the understanding of the public. *The evidence has all been dealers' evidence only, and this will not be enough where the market*

is the whole public. (Cellular Clothing Company v. Maxton & Murray, ubi supra.)"

Fels v. Stephenson, 21 R. P. C., 88, 89, Romer, L. J.:

"During that time, before other manufacturers in this country prepared and sold naptha soap, the customers, who knew the plaintiff's soap and liked it, not unnaturally then asked for it as 'Naptha Soap' simply, and, of course, there being no other manufacturer's soap on the market, when they spoke of the soap as 'Naptha' they meant the plaintiff's and nobody else's soap. Of course they could at that time have meant nobody else's soap, but such evidence as that, and the evidence generally that we have in this case, is to my mind wholly insufficient to enable this court to say that what was originally a purely descriptive term has acquired a secondary signification, so as to give the plaintiff a sort of proprietary right in the term."

S. Chivers & Sons v. S. Chivers & Co., Ltd., 17 R. P. C., 421:

"It appears to me that the issue thrown upon the plaintiff in a case of this sort is to prove that the world has come to know that particular article associated with his name as meaning his manufacture, and that only. When I say 'the world', I am using another phrase similar to that used by Lord Shand. I do not, of course, mean every human being in the Kingdom, but I mean *all persons whom it in any way concerns.* A man's own customers know his own jelly, and do not know other people's because they have never troubled themselves to ascertain whether there were such other persons at all. But in ordr to give the name 'Chivers' Jelley' that secondary signification which the plaintiffs desire to attach to it, and not to make it mean simply a jelly made by a person of the name of Chivers, they must, in my judgment, show first of all that

that user has been *locally universal, at any rate in the sense that it extends in any locality over the area in which the defendant has traded....* If it were necessary for the decision of this case, I should hold myself that the universality really must be coextensive at any rate, with England and Wales. ***

"Further, there is another point which appears to me most material on the question of universality, and that is, that the name should have *to the whole of the trade and to all persons who have any knowledge of the article in question, the sole meaning' sought to be attached to it by the plaintiffs,*—that is to say, the original primary meaning must have been eliminated from the dictionary of the persons who deal in this article in the trade and all other persons whom it may concern to know.***Ballard said: 'If a customer asked me for "Chivers' Jelly" I should sell what I had in stock. If I had both I should ask him which he required.' He said the same with regard to jams, and I pause here to observe that it appears to me that, if the plaintiff could succeed as regards jelly, he could also succeed as regards jam, although in this particular case the defendant has been trading in jams for at least fifteen years. Lewis said the same thing: 'If asked for "Chivers' Jelly" I should give the defendants'. If I had both, I should ask which was wanted.' Mr. Hughes asks me to say that only shows how easily you can defraud and deceive the public, and that would be right if he had proved his case; but I use this evidence to show that he has not proved his case, and he fails to prove it because, unless I say both these men are dishonest, they have disproved the plaintiff's case."

PLAINTIFF'S TESTIMONY AS TO SECONDARY MEANING OF "COKE" AND "DOPE".

Under the patently reasonable tests applied in the English cases referred to, secondary meaning can be

established only by testimony of purchasers or dealers who not only know that there are competing articles of the same class but who know the names by which such competing articles are ordered. Such testimony may and usually does fail of its object in view of the unusually heavy burden which the plaintiff must sustain in such cases, but all other testimony is necessarily unconvincing for the reasons set forth in these decisions. Plaintiff's testimony not only fails to stand these tests but upon analysis clearly appears as testimony which obviously could be readily obtained whether the terms "dope" and "coke" are applied to plaintiff's product *exclusively* or to other drinks of the same class as well.

Nothing could be clearer than that dealers who for years have dealt in Coca-Cola and no other cola drink and who are known to their customers as handling Coca-Cola exclusively, could be expected to testify as they did, that they, for years, had supplied Coca-Cola on calls for "coke" and "dope" without protest from consumers and that these terms mean Coca-Cola. But such testimony obviously would be valueless *unless it also appeared that they had some means of knowing how other colas are ordered.* They have seen only one side of the shield. On the same scheme of proof, defendants' testimony that Star-Cola is commonly ordered as "coke" and "dope" at the base ball park at Nashville, Tennessee, could be held to establish that these terms mean Star-Cola and nothing else. Similarly, every customer who orders "coke" and "dope" in an establishment *known to sell Coca-Cola exclusively* reasonably could be expected to say upon inquiry that what he meant was Coca-Cola. But, this shows only that Coca-Cola is ordered as "coke" and "dope" and throws no light whatever as to whether or not other colas are similarly ordered.

The inherent defect of plaintiff's testimony is that it is the testimony of witnesses who actually did not know whether "coke" and "dope" are commonly used in ordering the other cola drinks or not and who, in very many cases, frankly admitted it.

Altogether, plaintiff has introduced eighty-six witnesses to prove their point. Classified according to occupation, they are:

70 trade witnesses.
6 of plaintiff's traveling salesmen.
5 of plaintiff's private detectives.
3 of plaintiff's bottlers.
1 of plaintiff's jobbers.
1 plaintiff's vice president and sales-manager.

The seventy trade witnesses are more specifically classified, as follows:

34 druggists, all operating soda fountains.
13 soda dispensers.
13 proprietors of cigar stores having soda fountains.
8 confectioners, 7 of whom have soda fountains, while the other handles "Coca-Cola" in bottles.
1 retail grocer, who handles "Coca-Cola" in bottles.
1 lunch-room proprietor, who has a soda fountain.

The testimony of these eighty-six witnesses may be broadly grouped into these classes: (1) Those who testify that "coke", "dope", "cocaine", "caffeine", etc., mean "Coca-Cola" and nothing else; (2) those who acknowledge that these words and phrases are used simply to describe the article in question, and are applied by the public to all cola drinks, regardless of their particular brand and (3) those who frankly admit that they

do not know whether or not those slang terms are applied to other colas.

Those belonging to the first class are, of course, plaintiff's officer, one of its bottlers, its salesmen, and detectives, and those of its "trade" witnesses who really do not know the article at all except as made by plaintiff. Those belonging to the second and third classes are naturally those who have some knowledge of the drink as manufactured by others. There is not one of these witnesses in either class who is not either directly or indirectly connected with plaintiff in a business way. The so-called "trade" witnesses are nothing more than plaintiff's agents,—"not agents in the strict sense of the word" to use the language of Parker, J., in *Burberry's v. J. C. Cording & Co.*, 26 R. P. C., 700, "but who buy the plaintiff's goods on special terms and re-sell either to the trade or public, and whose interest is to make their resales as large as may be." Not one of them handles any drink of the kind here in question except that of plaintiff's manufacture,—only eight have ever done so, and, of these, seven have purchased only a few gallons of the stuff to try it out and see what it was like, and, then, after a few days' trial, have, at plaintiff's solicitation, taken it out of their fountains and gone back to dispensing plaintiff's product exclusively, as they had done before.

NO CONSUMERS OR OTHER DISINTERESTED WITNESSES CALLED.

It is significant that in trying to make out that "dope" and "coke" mean "Coca-Cola" exclusively to the purchasing public, not a single member of the purchasing public was called upon by the plaintiff to give first hand information on the subject. On the contrary, its wit-

nesses are all more or less its agents, interested in varying degrees in its success, and, as pointed out by Lord Kyllachy, in *Dewar v. Dewar,* 17 R. P. C., 358, their testimony is "certainly not less open than usual to the observation that, when witnesses are being examined as to what they understood or understand, or what other people understood or understand, there is always a great deal of room for the display of interest, or business connection, and generally of party spirit." "The proof", said Lord Kyllachy in the same case, "is always and necessarily difficult; and it is difficult, among other reasons, for this reason, that it is so very easy on such a subject to produce a great deal of testimony not consciously false, and probably most distinct and emphatic, which is yet essentially loose, and almost always colored. In dealing with such testimony judges and juries are apt, —and I think rightly apt,—to be skeptical."

REASONS GIVEN BY PLAINTIFFS WITNESSES FOR THINKING "COKE" AND "DOPE" MEAN COCA-COLA AND NOTHING ELSE.

The principal grounds given by plaintiff's witnesses to support their view that "dope" and "coke" mean Coca-Cola exclusively are (1) that these terms were used before they knew of any other cola drinks; (2) that purchasers in stores which were known to handle Coca-Cola and no other cola, accepted Coca-Cola on calls for "coke" and "dope" without protest, and (3) that in stores known to handle Coca-Cola exclusively purchasers when asked what they meant by "coke" and "dope" said they meant Coca-Cola and in some cases added they did not know there was more than one such drink.

The first ground does not in the least support the supposition.

Burberry's v. C. J. Cording & Co., 26 R. P. C., 700:

> "When a witness says he knows the word 'Slip-on' as meaning, not only a particular kind of coat, but the coat of a particular manufacturer, it is material to know whether he is acquainted with the article as made by any one else. If he is not, the word, however it may be associated in his mind with the particular manufacturer, is not really to him a distinctive word."

Kellogg's Toasted Corn Flakes Co. v. Quaker Oats Co., 235 Federal, 657, 665:

> "Now, what significance * * * have the facts thus pointed out? From 1898 to 1906, the predecessors of the appellant had a virtual monopoly of the food product in question, and likewise, of the term 'Sanitas Toasted Corn Flakes', and so, inclusively, of the words 'Toasted Corn Flakes'; but this was only because, during that period, no one else was either making or dealing in the article. The employment of descriptive words under such a condition of trade as this does not give to the words a secondary meaning denoting only the maker's product; evidence that such a meaning is so acquired is of slight value; this for the reason that in such circumstances the words could not refer to any product except the single and particular one so monopolied; and, consequently, the occasion for associating the words with the maker of the product does not arise as it must when two or more competitors are making and selling similar products."

The second and third grounds even more obviously fail to support the witnesses' inference for here the purchasers are after the particular brand of cola they know

can be obtained, and which they know will be served upon calls for a "dope" or "coke". Any nick-name for a cola drink would answer, *where the particular brand desired is the only one on sale.* It is analogous to calling for "a beer", "suds" or "foam", where only the desired brand of beer was on sale,or ordering a glass of "light" or a glass of "dark" at the Rathskeller where "Senate" was the only light beer and "Mertzen" was the only dark beer dispensed.

ADMISSIONS BY PLAINTIFF'S WITNESSES THAT "COKE" AND "DOPE" MEAN ANY COLA DRINK.

T. J. HAIZLIP, a retail druggist, Ft. Worth, Texas:

> "You asked why I supposed people would apply the name 'dope' to one dope and not apply it to all the other dopes; well, I have an idea they apply it to all the other dopes. Yes, they put them all in the same class, *if they know there is another dope.* I know people who come in and say—if they asked somebody to take a drink—'Do you drink Coca-Cola, or do you drink Koke?' Well it's all dope anyway—what's the difference? So go ahead, I will drink with you'." (Rec., 1964).

J. M. PENLAND, a wholesale druggist, Waco, Texas:

> "Yes, I am acquainted with the fact that there are various drinks on the market similar to 'Coca-Cola'. I know that there is. Yes, sir, I class those drinks as dope, most of them.***I don't know that I would class all of them, because I don't know about them, but *the ones I do know about I would class as dope, yes, sir.*" (Rec., 1980).

J. W. HUGGINS, a "Coca-Cola" Bottler, Murfreesboro, Tennessee:

> "I do not know that I can give you the correct definition of the word 'dope' but I take it as meaning something like opium or morphine, something of that kind—that would be my idea about it.***Q. What does the word coke ordinarily mean to you? ***A. Well, it carries with it very much the same meaning that I gave you for dope, to me, to my mind.***If it has any meaning it is more like a 'coke-fiend', or a 'dope-fiend' or something like that. Oh, yes, I have heard of a 'coke-fiend'. Oh, yes-sir, I have heard of a person taking morphine or cocaine—anything like that—and referring to them as 'coke-fiends', oh, yes, sir. Yes, I have understood that these cola drinks had some kind of a drug in it of thta kind, some kind of narcotic. Yes, sir, I have heard it said that they had cocaine in them." (Rec., 2017-18).

S. B. CHRISTY, a "Coca-Cola" bottler, Murfreesboro, Tennessee:

> "Yes, sir, I have heard of a person who used cocaine; I have heard them referred to as a dope fiend, and I have also heard them called cocaine fiends. (Rec., 2031).***Yes, sir, they called our drink (made from 'Nerve-Ola' syrup) 'coke' in 1902. All of us at the factory called it coke, and the men that worked at the factory, and the people in general—our customers. *The fact of the business is they call all of these drinks coke at times. These cola drinks are generally known as cokes and dopes.*" (Rec., 2034).

JOHN H. BOHNE, a "Coca-Cola" jobber, St. Louis, Missouri, and former manufacturer of "Orin-Cola":

> "We created a demand for our drink under the

name of 'Orin-Cola'. I place that beverage in the class which I designate as cola drinks. *It was known as 'dope' also.*" (Rec., 2046).

CLAUDE W. HICKEL, formerly a dispenser of a number of dope drinks at Ocala, Florida, now of Charleston, West Virginia:

"A majority of the customers of the Anti-Monopoly Drug Store could tell the difference between the drinks that we were selling and 'Coca-Cola'.*** The reason why I know the majority of them could tell the difference between the drinks we sold, and 'Coca-Cola', is because they would tell me so. We had some customers that came there every day or two to our place and they usually came to our fountain. The majority of our customers—what I mean, regular customers—don't ask for 'Coca Cola'; they asked sometimes for 'dope' and sometimes 'coke', but they knew they were not getting 'Coca-Cola'. (Rec., 2066-7).***We called them 'dope', 'coke'—whatever the customer asked for. Q. What names did you use to classify those drinks? A. *We generally called them 'dope'.*" (Rec., 2065).

GEORGE L. SEIBERT, a soda dispenser, Mobile, Alabama:

"Any one taking cocaine, you call that 'dope', and it means a drug on the order of cocaine, that's the only way I ever heard of it, and a drink something *on the order of* 'Coca-Cola'.***You ask if there is any other drink I know of called 'dope'; well, only *on the order of 'Coca-Cola', Yes, sir, any drink on the order of 'Coca-Cola' is called 'coke' and 'dope'.*" (Rec., 553).

JOHN W. GRAHAM, a soda dispenser, Mobile, Alabama:

"When I got experience, a man came in, asked for 'coke', nine times out of ten he wants 'Coca-Cola'." (Rec.,556).

O. P. BLAND, a confectioner, New Orleans, Louisiana:

"Now, I want to tell you, if I handled 'Koke' or any thing they called 'dope', and I handled 'Coca-Cola'—I handled all three—and a man came in and ask for 'koke' I would give him 'Koke', and if he asked for 'dope' I would give him 'Dope', if he asked for 'Coca-Cola' I would give him 'Coca-Cola', but I handle only the one, and consequently I give him only that." (Rec., 670).

O. M. BROWN, a drug clerk, Oriental Drug Store, Dallas, Texas:

"About three weeks ago at the request of the 'Coca-Cola' representative, Mr. Peace, I put on a test at the Oriental Drug Store, of our customers coming in. Q. Well, now what proportion of these people that called for 'coke' during the time that test continued, wanted 'Coca-Cola'—that called for 'coke'? A. *Well, half of them anyway.*" (Rec., 764).

ALL THE REST OF PLAINTIFF'S WITNESSES ADMIT THEY DO NOT KNOW OR THAT THEY ARE IN NO POSITION TO KNOW, WHETHER OR NOT THE SLANG EXPRESSIONS, "COKE", "DOPE", ETC., ARE USED TO INDICATE THE MAKER OF THE ARTICLE, OR MERELY TO DESCRIBE ITS CHARACTERISTICS.

DAVE S. BAUER, a retail druggist, Mobile, Alabama:

"No, sir, you didn't understand me to say that I carried no other soft drink but 'Coca-Cola'; I said no other *cola* drinks. (Rec., 538).***No, sir; I don't know the names the public use in calling for those numerous cola beverages. (Rec., 542).***No, sir; I don't know the names by which the public asks for these drinks or for drinks of that class. I don't know whether they ask for those drinks by the name of 'dope' and 'koke' or not. No, sir; I don't know whether 'coke' and 'dope' are also nicknames for those drinks." (Rec., 543).

C. H. UPCHURCH, a retail druggist, Mobile, Alabama:

"No, sir, I have never handled any other beverages similar to 'Coca-Cola'. I have never handled any other cola beverages except 'Coca-Cola'. No, sir; I have never seen any other cola beverages bought or sold.***No, sir; I don't know what names the public use in calling for these beverages.***I don't know whether the public calls for these beverages under the names of 'coke' or 'dope'." (Rec., 525).

E. R. ALBRIGHT, a retail druggist, Mobile, Alabama:

"No, sir; we don't handle any other drink now except 'Coca-Cola' *and so, of course, I don't know what the users of other drinks call their particular drink.*" (Rec., 550).

GEORGE L. SEIBERT, a soda dispenser, Mobile, Alabama:

"No, sir; we don't handle any other cola drinks

at our fountain except 'Coca-Cola'. I have never heard anybody ask for any other cola drinks than Coca-Cola'.' (Rec., 554).

A. M. TIMMS, a retail druggist, Dallas, Texas:

"I don't handle anything else except 'Coca-Cola'. I don't handle anything of that class, any rival drinks, cola drinks." (Rec., 754).

Other testimony of plaintiff's witnesses to the same effect:

F. M. GREEN, (Rec., 454).
I. L. JAMES, (Rec., 461).
J. D. T. LAWRENCE, (Rec., 471).
DAVID G. WISE, (Rec., 476).
J. F. REDDING, (Rec., 479).
W. A. MEDLOCK, (Rec., 483-4).
LINTON STEPHENS, (Rec., 486).
T. C. MARSHALL, (Rec., 495).
J. B. PENDERGRAST, (Rec., 497).
JOHN NEHOS, (Rec., 512).
R. W. ELLIOTT, (Rec.,566).
I. D. WOOD, (Rec., 570-3).
GEORGE S. MORSE, (Rec., 647).
CECIL V. RODGERS, (Rec., 737-8).
JACOB SCHRODT, (Rec.,742-4).
CHARLES R. SMITH, (Rec., 747).
J. W. ARRANT, (Rec., 749).
JAMES ROGERS, (Rec., 755-6).
S. Y. ALTHOFF, (Rec., 763).
O. M. BROWN, (Rec., 764).
E. B. THOMAS, (Rec., 771).
C. D. KINGSTON, (Rec., 792).
F. L. SKILLEN, (Rec., 795).
E. EWER, (Rec., 808).

W. H. RAMSEY, (Rec., 820).
J. B. SMITH, (Rec., 825).
T. J. BRITTON, (Rec., 831).
EDWARD T. LANGAN, (Rec., 897).
T. J. HAIZLIP, (Rec., 1966).
J. M. PENLAND, (Rec., 1981-2).

PLAINTIFF'S TESTIMONY AS TO "SPIGOT TESTS".

Plaintiff's detectives testified that in very many places where observations were made, orders for 'Coca-Cola', "coke", and "dope" were filled from the same spigot. Since practically all the dealers in whose shops these tests were made carried no other cola, "coke" or "dope" than "Coca-Cola", this is not surprising. Doubtless, if they carry no other root beer than Hires, orders for "a root beer," "Hires" and "Hires root beer" are filled from the same spigot.

PLAINTIFF'S SO-CALLED "CONSUMER TESTS"

These tests were made in this way: "The detectives would "'instruct" the dispenser on duty at the fountain where the test was to be made to ask each person who called for "coke" or "dope during the time the test lasted, if he wanted "Coca-Cola",—usually by merely asking "Coca-Cola?". (Rec., 729) but sometimes by asking what the customer wanted. The detective would station himself in the vicinity of the fountain where he could hear the questions of the dispensers and the replies of the customers. These tests were, without exception, made at places that carried nothing in the cola line but "Coca-Cola", that never had dealt in anything else of that kind, and that were well known in their

communities to be handling nothing but "Coca-Cola".

It is enough to say of these tests that the plaintiff selected obviously remarkably good places to secure the results sought to be obtained but obviously remarkably poor places to get at the facts.

How inviting such a place must have been in which to stage an experiment of this character, and how valueless the results obtained is shown by the following testimony:

CECIL V. RODGERS, a retail druggist, Dallas, Texas:

> "Yes, sir; my establishemnt is well known as keeping 'Coca-Cola'. *It has always enjoyed that reputation, and my customers are 'Coca-Cola' customers.* I have had them very often to make the remark that they would walk two or three blocks out of the way because they knew they were going to get genuine 'Coca-Cola'. Of course, I cater to them to keep regular habitues of 'Coca-Cola'—to try to keep a regular trade as regular habitues of 'Coca-Cola'." (Rec., 737-8).

JACOB SCHRODT, a retail druggist, Dallas, Texas:

> "My custom is built up as a 'Coca-Cola' custom in that particular line, and, of course, I try to keep it, and *they so understand* that I am catering to the 'Coca-Cola' taste and custom." (Rec., 742).

J. W. ARRANT, a retail druggist, Dallas, Texas:

> "We have the reputation of being the largest dispenser of 'Coca-Cola' in Dallas, and we handle large quantities of it. We make that our specialty, and since we cater to it, we want that custom and we

certainly do keep it.****Our customers, of course, are 'Coca-Cola' customers;* they come there because they know they can get 'Coca-Cola' there.****Everybody in Dallas knows they can't get anything but 'Coca-Cola' from me.* No soft drinks similar to that are carried; no cola drinks." (Rec., 749).

S. Y. ALTHOFF, a soda dispenser, Dallas, Texas:

"Yes, sir; our customers are 'Coca-Cola' customers. *They come to us because they know we sell it.* It is our boast, our brag that we dispense pure 'Coca-Cola' and nothing but pure 'Coca-Cola'." (Rec., 763).

DEFENDANT'S TESTIMONY AS TO SECONDARY MEANING OF "COKE" AND "DOPE".

Defendant presented the testimony of 71 witnesses to the effect that "coke" and "dope" are generic nicknames for, as one witness puts it, all drinks on the "dope" or "coke" order (Rec., 1334),—that is, all cola drinks, and not for one member only of this class of beverages.

These witnesses are almost without exception, merchants or soda fountain dispensers who have sold a number of different cola drinks, so that they have real, first hand knowledge from actual experience what "coke" and "dope" means to the public.

Their testimony shows that these terms are used in connection with the different cola drinks because the public considers that such drinks contain "dope" or "coke".

Their testimony shows that consumers commonly use "coke" and "dope" in ordering many different desired cola drinks.

Their testimony shows that dealers in giving their wholesale orders for different colas to the bottlers of these drinks frequently use the terms "coke" and "dope".

Their testimony shows that when customers have asked for a "dope" or a "coke" and are asked what kind will indicate that any "dope" will do, or will designate as their preference any one of several different brands of cola.

Their testimony shows that where Coca-Cola is ordered and the customer is told that it is not in stock, he will indicate that some other "dope" or "coke" will do and will make use of these terms.

The testimony of deponents witnesses as to the secondary meaning of "coke" and "dope" is set forth in Schedule II, Vol. 2.

SIGNIFICANT USE OF "COKE" AND "DOPE" WHERE STAR-COLA AND NOT COCA-COLA IS KNOWN TO BE THE ONLY COLA ON SALE

W. F. BOYLIN, of Nashville, Tennessee:

> "Out to the baseball park here in the summer time, there is no cola drinks sold there except Diehl & Lord's Star-Cola that is sold in bottles.***
>
> I have heard it asked for as koke or dope, nearly always in calling for a drink out there, I say, "Give me a coke", or "a cola". I do not think I am getting Coca-Cola when they serve it to me. People in asking for a drink at the ball park by the names koke and dope, can tell they are getting Star-Cola and that it is not Coca-Cola by the crown on the bottle and advertising in the park that Diehl & Lord have the exclusive rights there to sell Diehl & Lord's Star-Cola." (Rec., 1075).

PAUL E. WEBB, of Nashville, Tennessee:

"At the ball park here at Nashville, they serve Diehl's Star-Cola in bottles. They ask for Koke and they give them that. It has a red label on the bottle. The bottle has a big label on the side of it. They ask for that by coke and dope. I never heard anyone who asked for it by dope and koke reject it on the ground it was not what they asked for. They mostly call for it by dope and coke for it is advertised in the park. They have a large advertisement that says 'Call for Diehl's Star-Cola'. The boys carrying the containers they have for bottles, they have labels on them all over the sides, 'Diehl's Star-Cola only'. The people who ask for dope know that they are getting Star-Cola." (Rec., 1120).

P. E. JOHNSON, of Nashville, Tennessee:

"At the ball park here in the summer time they serve Pepsin and Diehl's Star-Cola and the other drinks that run in that class. Diehl's Star-Cola is all that is advertised out there. The boys holler Star-Cola, Diehl's Star-Cola.***If people ask for Dope or Koke at the ball park they get Diehl's Cola. When they get Diehl's Cola they know they are getting that because it is labeled." (Rec., 1152).

W. W. RANDOLPH, of Nashville, Tennessee:

"They dispense Cola Drinks at the base ball park, they serve Diehl & Lord's Cola there, that is served in bottles. They call for a dope or a koke or just any of those names in asking for it out there and are served with Diehl and Lord's Cola there. I never heard anyone object to it and say it was not what they wanted when they were served with it on a call for a Koke or a Dope." (Rec., 1161).

W. M. POLLOCK, of Nashville, Tennessee:

"I have gone out to the base-ball park. They serve Diehl's Star-Cola there in bottles. I have drank it out there. I always say give me a coke or give me a dope, that is what I say at places like that and they serve me Star-Cola. I do not think I am getting Coca-Cola when they serve that to me. I know I am not because the boys don't holler that, and there is advertising on the crown. They holler Diehl's 'Star-Cola'." (Rec., 1204-5).

J. C. PRICE, of Nashville, Tennessee:

"I have been out to the ball park here, they sell and advertise Star-Cola out there. I have heard people out there, patrons, asking for Koke and Dope. I have hollered at the boy to give me a bottle of Dope, I call it Dope. He would give me Star-Cola. You could tell by the bottle they were not giving you Coca-Cola. It says Diehl's Star-Cola on the bottle and crown." (Rec., 1206).

TESTIMONY OF CONSUMERS AS TO WHAT THEY MEAN WHEN THEY USE "COKE" AND "DOPE".

M. J. COSTELLO:

"When I went to a soda fountain and asked for a 'dope' I expected to get what he had in that line, whatever it was. No particular brand." (Rec., 1001).

C. H. JOUETT:

"If I go into a fountain and ask for a shot, I do not care what he gives me, so long as it is a cola drink." (Rec.,1055).

JOHN R. PARDUE:

"I frequently go into fountains myself and ask for cola drinks, I ask for them as koke or dope, it makes no difference to me so as I get a cola drink." (Rec., 1134).

W. F. BOYLIN:

"When I go into a soda fountain***and ask for a dope, I expect to get a cola drink. If I go in and ask for 'a coke', I expect to get any cola drink.***" (Rec., 1074).

W. W. RANDOLPH:

"The words Koke or Dope is used for all these drinks. I use it to apply to these different drinks." (Rec., 1161).

W. M. POLLOCK:

"I think they ('coke' and 'dope') mean a cola drink. That is what I mean when I call for them. I go into a soda fountain and ask for a 'coke' or a 'dope' mighty near every day. I expect to get a cola drink." (Rec., 1202).***(At the Nashville ball park) I always say: 'Give me a coke; or Give me a dope,' and they serve me Star-Cola". (Rec., 1205).

J. C. PRICE:

"I have hollered at the boy to give me a bottle of 'dope'—I call it 'dope' he would give me Star-Cola.***I do not consider when I go into a soda fountain and ask for a 'Dope' or a 'Koke' that I am making a definite and specific demand upon the dispenser to give me a 'Coca-Cola' and nothing else, because if I wanted *Coca-Cola*, I would ask for it when I went in." (Rec., 1206 and 1208).

H. L. FISHER:

"I sometimes go in and ask for these drinks myself. I go in and say, 'give me a bottle of "dope"' and I get anything that he gives me. I am not expecting any certain thing." (Rec., 1346).

E. D. MONTGOMERY:

"When I ask for a Dope, I don't know what I expect to get—Chero-Cola, Coca-Cola, Koke, most any other drink that is put up in that beverage because they handle so many different grades.*** I do not consider when I go in and ask for a dope that I am making a specific and definite demand for Coca-Cola." (Rec., 1358).

EDW. J. OPLE:

"When I ask for a Dope I expect to get most any of them. (Rec., 1404). When I go into a soda fountain and ask for a Dope, I do not consider that I am asking the dispenser specifically and definitely to serve me with Coca-Cola. If I were served with Rye-Ola or Ala-Cola or anything of that sort, I would think I was getting what I asked for." (Rec., 1405).

H. T. CRISLEY:

"Before I went into business, and went into the soda fountain business and asked for a Dope or Koke, I expected to get some cola drink, other than Coca-Cola. When I wanted Coca-Cola, I asked for Coca-Cola." (Rec., 1427).

ROBERT E. OWSLEY:

"When I go into a soda fountain and ask for a Dope or a Koke it does not make any difference the

brand, in fact any kind so long as it is satisfactory." (Rec., 1450).

HUGH LEE BOYD:

"When I ask for Koke and Dope, I expect to receive a cola drink." (Rec., 1455).

ALPHONSE GOLDSMITH:

"I have gone into a soda fountain and asked for a Koke or a Dope. I have expected to get when I asked for that a Koke or Dope." (Rec., 1494).

C. J. THORNTON:

"I have been in the drug business in Hattiesburg since about 1911. I used to drink a heap of these various beverages prior to that time. I have heard Dope ever since I have heard of dope, about 18 years ago, I asked for Dope and got a drink of Dr. Pepper's." (Rec., 1767).

W. A. HICKMAN:

"When I asked for Dope they would give me Dope or Koke. I would not know what to expect." (Rec., 1824).

PLAINTIFF NOT ENTITLED TO A MONOPOLY ON THE POPULAR NICKNAMES OF COLA BEVERAGES.

Notwithstanding (a) that "cola" (also spelled "kola") was the name of a beverage containing cola extract long before Coca-Cola was made[16], (b) that it is

[16]"The presence of theine, then, at once points to the analogy of Kola-nut, or at least of drier Kola-nut, with coffee, tea, and two other similar but less common substances—Paraguay Tea and Guarana. **Infusions of one or other of these vegetable products are used as beverages probably by three-fourths of the human race and each con-**

the well understood generic name for colas, and (c) that it forms a part of the names of a multitude of different brands of cola, the plaintiff, as late as January 6, 1920, was contending that it is entitled to a monopoly on the use of the word "Cola" in connection with cola beverages.

Coca-Cola Company v. Chero-Cola Company, in Opposition No. 1,662, (10 Trade-Mark Reporter, 94):

> "Apparently it was sought to be established that The Coca-Cola Company had the right to prevent

tains the same active principle—Theine. **To these must now be added the Kola-nut.** Thus does chemistry reveal the true reason why the unerring instinct of man, even in his savage state, has led him to select from the many thousands of plants presented to him in nature, just four or five with which to concoct a beverage that would seem to be a necessary rather than a luxury of life." (Pharmaceutical Journals and Transactions, 2nd series, Vol. 6, 1864-5, London, 1865, page 458.)

"STERCULIA ACUMINATA. **Cola acuminata** Daniell. This is a large Africal tree known as the source of the **kola nuts** of Guinea. In the twelfth edition of the Dispensatory we announced that Dr. Daniell had just discovered in these nuts a crystallizable alkaloid, which he believed to be **thein,** or as it is now called **caffein. He was induced to make the examination by noticing that, after taking a decoction of the seeds, he was affected with a long-continued loss of sleep.** Since that time, we have had a more particular account of the nuts from Dr. Daniell, and a detailed analysis by Dr. J. Attfield, which fully confirm the conjecture as to the existence of thein in them. They are extensively used and highly valued throughout a large part of Africa, being chewed for their agreeable effects on the system, and the remarkable property of causing wakefulness. The possession of this property is explained by the presence of caffeine in the seeds; and thus another is added to the list of vegetable products, which, having been employed by the natives of the country where they grow, as an agreeable stimulant to the nervous system, have been found to contain caffein." (The Dispensatory of the United States, 1877.)

CHEMICAL INVESTIGATIONS ON THE KOLA. By E. Heckel and F. Schlagdenhauffen. **(Ann. Chim. Phys.** (6), 1, 129-138).—**The extract of the kola-nut from a plant of the Sterculiaceae family, is used as a beverage by the inhabitants of Central Africa, as tea or coffee by the Asiatics and Europeans, or 'mate' by the Americans.** As few specimens of the plant have come to Europe, investigations on the chemical nature and therapeutic functions of the extract have been incomplete; but the experiments of Daniell and Attfield have proven the presence of an alkaloid resembling that from tea or coffee. From the opening out of commercial routes into Central Africa considerable quantities of the true kola or **Kola femelle,** and of its principal substitute, Kola bitter, have been shipped into France." (Chemical Society Journal, New Series, Vol. XLVI 1884, Abstracts; page 863-4, Article 2.)

> the use of the word "Cola" on a syrup or a drink similar to that manufactured by it but that has not been the holding of the courts. In the case of Coca-Cola Co. vs. Williamsburgh Stopper Co., 2 T. M. Rep., 234, Judge Hough refused to grant an injunction against the use of the mark "Espo-Cola" although he enjoined the defendant from writing that mark in script form similar to that used by The Coca-Cola Company, and in the case of Seth A. Fowle vs. Miner's Fruit Nectar Company, Judge Brown likewise refused to enjoin the use of the words "Miner's Citro-Cola". In each of these cases it was held that the defendant had a right to manufacture what might be termed a cola beverage, that is, a beverage having cola as an ingredient."

The plaintiff, in this action, is seeking to monopolize the popular nicknames applied by the public to the various brands of cola, and thus secure an unfair advantage over its competitors contrary to the fundamental principle of the law of trade-marks and unfair competition.

Rumford Chemical Works vs. Muth, et al., 35 Fed., 529, (Morris, J.):

> "While a court of equity should regard with disfavor, and seek to remedy, invasions of proper trade-marks, and to rebuke all unfair dealing by which the good will earned by one trader is unlawfully pirated by another, care must be exercised that protection is not granted to the appropriation of descriptive names in such manner that a perpetual monopoly is created in the article described, in favor of those who have no exclusive right to manufacture it. (Canal Co. v. Clark, 13 Wall., 311)."

The Winchester Repeating Arms Company vs. The Peters Cartridge Company, 30 App. D. C., 505, (Robb, J.):

"The record discloses that there is nothing patentable about the cartridge to which the exclusive privilege of applying these words (Self-Loading) is sought. The grant of such a privilege would result in a decided advantage to appellant and enable it to enjoy a measurable monopoly not contemplated or authorized by law."

Saxlehner vs. Wagner, et al., 216 U. S., 375, (Mr. Justice Holmes):

"The real intent of the plaintiff's bill, it seems to us, is to extend the monopoly of such trade-mark or trade-name as she may have to a monopoly of her type of bitter water, by preventing manufacturers from telling the public in a way that will be understood what they are copying and trying to sell. But the plaintiff has no patent for the water, and the defendants have a right to reproduce it as nearly as they can. They have a right to tell the public what they are doing and to get whatever share they can in the popularity of the water by advertising that they are trying to make the same article and think that they succeed. If they do not convey, but, on the contrary, exclude the notion that they are selling the plaintiff's goods, it is a strong proposition that when the article has a well-known name, they have not the right to explain by that name what they imitate. By doing so they are not trying to get the good-will of the name, but the good-will of the goods. (See *Flagg Manufacturing Co. vs. Holway*, 178 Mass., 83, 91; *Chadwick vs. Covell*, 151 Mass., 190, 191)."

INJUNCTION AGAINST USE OF "KOKE", "COKE", and "DOPE" UNJUSTIFIED UNLESS THESE TERMS DESIGNATE PLAINTIFF'S PRODUCT EXCLUSIVELY.

The District Court's action in enjoining the use of

" 'Koke' or any like word", or " 'Dope' or any like word" could find legal justification only in the establishment by plaintiff that these words designate its product exclusively. But the evidence shows beyond question that these terms are generic nick names for all colas and are as clearly *publici juris* in the soft drink trade as they are in the drug industry.

"KOKE" USED IN 1888.

The finding of the District Court that "the Koke Company of America and its predecessor, J. C. Mayfield did not adopt or make use of the name "Koke" until the year 1909" is directly contrary to the weight of the evidence.

The Examiner of Interferences found from the identical testimony, now relied on, that the mark, "Koke" was used by Mayfield and his partners in the Pemberton Medicine Co., from 1888 to 1898 and thereafter by Mayfield to 1903. This finding was based upon the unimpeached testimony of one of the partners, Murphy (Rec., 1283), a daughter and a son-in-law of another of the original partners, (Banks, Rec., 1411), and Miss Marion Bloodworth, (Rec., 1263), a friend who visited Mayfield about 1892 or 1893 (Holly, Rec., 1275), and a bottler who bottled and sold "Koke" during 1900, 1901 and 1902, and who gave a list of several of his customers (McGraw, Rec., 1317), (Exhibit E, Appendix to Petition for Certiorari, p. 70).

The Examiner of Interferences held that Mayfield abandoned the use of "Koke" after 1903, but even if non-use were shown during the period of five years from 1903 to 1909, no intent to abandon the mark was

established, and this is essential to the establishment of abandonment.

Saxlehner v. Eisner & Mendelson Co., 179 U. S., 19; 45 L. Ed., 60 (Mr. Justice Brown):

> "To establish the defense of abandonment, it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. (*Singer Mfg. Co. v. June Mfg. Co.*, C. D., 1896, 687; 75 O. G., 1703; 163 U. S., 169, 186; *Moore v. Stephenson*, 27 Conn., 13; *Livermore v. White*, 74 Me., 452; *Judson v. Malloy*, 40 Cal., 299; *Hickman v. Link*, 116 Mo., 123). And in a recent English case, this doctrine has been applied to a case of trade-marks. (*Mouson v. Boehm*, 26 Ch. Div., 398)."

There is certainly no presumption that Mayfield would want to abandon this mark, following 1903, after fifteen years use of it, particularly as at least one bottler was buying "Koke" extract from him in 1904 (McGraw, Rec., 1317), and he was still in the business of selling soft drink extracts.

While the testimony as to Mayfield's use of "Koke" for five of the 21 years from 1888 to 1909 is perhaps not as conclusive as could be desired, it is believed to be ample to rebut any assumption that he ever abandoned the mark.

Defendants' testimony as to the use of "Koke" is set forth in Schedule III, Vol. 2.

DEFENDANTS DID NOT ADOPT "KOKE" OR "DOPE" FOR THE PURPOSE OF REPRESENTING THEIR GOODS TO BE THOSE OF THE PLAINTIFF.

"Koke" was adopted in 1888, before "Coke" was applied to Coca-Cola or any other cola drinks. Dope was used after the purchase of trade-mark registration No. 63,033 on "Dope".

These words, or at least "Coke" and "Dope" are, as shown, purely generic names for a class of drinks. Instead of using "Cola" or "A Cola Drink" or "Soda Fountain Syrup Cola", the Koke Company used the corresponding slang names.

Unless the officers of the Koke Company believed that its registrations on "Koke", and "Dope", and use of "Koke" gave it valid and enforcable exclusive rights to the use of these names, little can be said in justification of its asserting by circulars or otherwise, any exclusive rights therein. There is no presumption, however, that they believed or had reason to believe, these registrations invalid and, in any event, it would be natural for them to give themselves the benefit of the doubt. But, at least, even if their trade-mark registrations were invalid, they certainly had the right in common with all cola manufacturers, to use these generic names on their drink. It is inconceivable that any manufacturer should not be entitled to sell any commodity whether sugar, flour, or cola, under a generic name.

Defendants used the words "Koke" and "Dope" to take advantage of what Mr. Justice Holmes, in *Saxlehner v. Wagner, et al., supra*, termed "the good will of the goods", and were obviously within their rights, in

making use of names which, as the record shows, are clearly *publici juris.*

DEFENDANTS' SALESMEN WERE NOT INSTRUCTED TO SELL AND DID NOT SELL KOKE AND DOPE AS AND FOR COCA-COLA.

Obviously it would have been impossible for salesmen of the defendants to sell their product as and for the beverage of the plaintiff and equally absurd to try, since dealers are acquainted with Coca-Cola, its manufacturer, and where it can and must be purchased. The plaintiff has never even contended that this was done and the finding of the District Court in this regard is, on its face, incorrect.

The weight of the evidence, which is set forth in Schedule IV, Vol. 2, shows that defendants' salesmen have not aided or induced retail dealers to sell defendants' goods as and for those of the plaintiff. But even if the testimony showed that an occasional misrepresentation of this character, unknown to defendants and unauthorized by them, had been made, it would not entitle the plaintiff to the relief afforded by the District Court.

Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., 241 Fed., 817, (C. C. A.-5, Grubb, J.):

> "There is evidence in the record that agents of the defendants advised purchasers of defendants' bottled beer in brown bottles with brown labels that it might be sold as plaintiff's beer to their customers. The defendants deny any knowledge of any such representations by their agents, and deny that any authority was given their agents to make such

representations. The District Court found the facts against the plaintiff on this issue, and dismissed the bill, either because not satisfied that the representations were made by the agents or, if made, that they were authorized by the defendants, or known to them. Occasional misrepresentations of soliciting agents, not shown to have been known to or authorized by defendants, would afford no ground of relief on the ground of unfair competition, apart from an improper dress for their goods."

The weight of the evidence which is set forth in Schedule V, Vol. 2, shows that except in a very few isolated cases of dishonest dealers, defendants' goods have not been substituted for those of plaintiff, or those of any other cola manufacturer.

A. G. Morse Co. v. Walter M. Lowney Co., 256 Fed., 935, (Carpenter, J.):

"The defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant, knowing better, provided defendant has done its legal duty in distinguishing its own product from that of complainant." *Rathbone v. Champion Co.*, 189 Fed., 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; *Schlitz Brewing Co. v. Houston Co.*, 241 Fed., 817, 154, C. C. A., 519.

DEFENDANTS LABELS AND CROWNS UNLIKE THOSE OF PLAINTIFF.

The District Court enjoined the use of defendants' present labels and crowns, but this action must have been based upon its holding that the use of "Koke" and "Dope" infringe plaintiff's rights, since the labels and crowns used by defendants are not deceptively similar to those of plaintiff.

J. C. MAYFIELD, Sr., President of the Koke Company of America, says (Rec., 1628):

> "We have had various sizes and kinds of labels, but have not adopted any particular size or shape."

Specimens of a few of the several different kinds of labels the defendants have used are shown by the following exhibits (The first column shows the number of the exhibit; the second, what the exhibit is, and the third the page of the record where it is identified):

1	2	3
Defts'. Ex. 79	Shipping tag	Rec., 1622
Defts'. Ex. 119	"Koke" Barrel Label	Rec., 1627
Defts'. Ex. 120	"Koke" Barrel Label	Rec., 1627
Defts'. Ex. 121	"Koke" Jug Label	Rec., 1627
Defts'. Ex. 122	"Koke" Bottle Label (Square)	Rec., 1627
Defts'. Ex. 123	"Koke" Bottle Label (Diamond shape, with "Koke" in red, on yellow background)	Rec., 1627
Defts'. Ex. 124	"Koke" Shipping Tag for Barrels and kegs	Rec., 1627
Defts'. Ex. 125	"Koke" Bottle Label (Diamond shape, with word "Koke" in blue, on light blue background)	Rec., 1628
Defts'. Ex. 59	"Koke" bottle Label (Same as Defts'. Ex. 125)	Rec., 1571
Defts'. Ex. 158	Sticker for attaching to invoices	Rec., 1632
Defts'. Ex. 165	"Dope" Bottle Label	Rec., 1633
Defts'. Ex. 181	"Koke" Bottle Label (used in Shreveport, La.)	Rec., 1700

Defendants also stencil the word "Koke" and "Dope" on their barrels and kegs.

Of all these different kinds of labels, the only one that plaintiff complains of as resembling any of its labels, is the blue bottle label marked *Defendants' Exhibit* 125 (also shown as Defendants' Exhibit 59).

Plaintiff's rebuttal exhibits 5, 6 and 9 to the testimony of W. F. Boylin, (Rec., 1144-5), are catalogs, and pages from catalogs, of the American Label Works, Nashville, Tennessee, showing numerous specimens of bottle labels used generally in the trade by soft drink bottlers. It

will be observed from the specimens of labels here shown that the size, shape, color, design and wording around the periphery of plaintiff's bottle label—namely, *"Bottled under authority of"*,—are all features which are old in the art and common to the trade, and afford no indication whatever as to maker. The trade name of the product shown conspicuously in the center of the label, together with the name of the concern under whose authority it is bottled, are the only indications of origin to which an intending purchaser, exercising ordinary care to ascertain what he was getting, would be justified in looking. *Coats v. Merrick*, 149 U. S., 562; 37 L. Ed., 847.

The particular blue bottle label about which so much has been said, does resemble the corresponding bottle label used by plaintiff in certain respect, which are common to soft drink labels generally used. *The most prominent feature of both labels, however, is the name of the product boldly displayed in the center.* Plaintiff's bears the words "Coca-Cola" in large type, while defendants' bears the word "Koke" in type equally large and conspicuous. No one in the exercise of the slightest care to ascertain what he was getting could possibly be misled as to the source of the goods to which defendants' label was attached.

There is no evidence that this label has, in fact, ever deceived anybody, and as its use has been discarded, there is no possibility that it ever will. It was used only by two bottlers,—one in New Orleans, and the other in Dallas, Texas,—for a period of about five or six months in 1913. Its use was discontinued upon instructions from J. C. Mayfield, Sr., months before this suit was brought, and a yellow and red label, having no similarity to plaintiff's label, was thereupon adopted and has since

been used in its stead. See the testimony of J. C. Mayfield, Sr., (Rec., 1634); J. A. Bermudez, (Rec., 1499); John F. Williams, (Rec., 1549); W. McCarty Moore, (Rec., 1743-8).

Plaintiff introduced five bottles *(Plaintiff's Exhibits* 156 to 160, inclusive), having attached to them a blue "Koke" bottle label, (Defendants' Exhibit 125), which plaintiff's detective, Sam Friend, says he purchased at Payne's Soft Drink Stand in Dallas, Texas, at 8:30 a. m., August 10th, 1914 (Rec., 849), the day before he gave his testimony in this case (Rec., 682). If these bottles were *bona fide* purchases, actually made at the time Friend says he bought them, that would not disprove the fact that the use of this label was discontinued generally pursuant to defendants' instructions. All it would prove would be that in the isolated instances thus shown, a few of them were used by defendants' bottler in Dallas, Texas, on or about August 10th, 1914, without the knowledge or consent of the defendants, and against their instructions.

These five bottles are the only ones plaintiff has produced as evidence that any of defendants' bottlers ever used the blue labels after defendants had ordered its use discontinued, although plaintiff's detectives had been for two years or more raking the country with a fine tooth comb in search of evidence that would be damaging to defendants. (Rec., 2101).

The circumstances showing how W. McCarty Moore happened to get up the blue label are fully explained by Mr. Moore, (Rec., 1743, et seq.), and would entirely exonerate the defendants from any charge of fraud, even if the two labels were deceptively similar.

Defendants' Exhibit 179 (Rec., 1642) is an envelope containing a large number of crowns that are in general use on the bottles, not only of the various brands of cola drinks, but of other kinds of soft drinks as well, such as sarsaparilla, root beer, &c. Among the brands shown are, "Cola-Queen", "Arrow-Cola", "Coca-Cola", "Koke", "Celery-Cola", "Candy-Cola", "Cola", "Cola-Nip", "Rye-Ola", "Gay-Ola", Mint-Cola", "Luck-Ola", "Peach-A-Ola", "Pure-Cola", "Sarsaparilla". These crowns are all of the same color and design as plaintiff's crown,—that is, they have the name of the product printed in red, on a silver background, with a red ring around the circumference of the crown. This is perhaps the most generally used design of crown on the market. The crown manufacturers turn out these crowns by the millions, and sell them to every one who does not specify any particular design. Crowns of this same design, used on other cola products, will be found on the bottles filed as *Defendants' Exhibit* 1, 2, 3, 4, 6, 43 to 54, inclusive, 189 to 213, inclusive, and 215 to 223, inclusive, and on *Plaintiff's Rebuttal Exhibits* 68 to 77 inclusive.

There is not a word of testimony in the record to the effect that the color and design of plaintiff's crown is, to any extent whatever, different from the color and design of crowns used generally in the trade, or that it affords the slightest indication, either to the general public or to any one else, as to the origin of the goods.

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tennessee, who formerly bottled a drink similar to "Coca-Cola" in bottles having thereon crowns (For specimen, see *Plaintiff's Rebuttal Exhibits* 101-2) exactly like the "Koke" crowns used on defendants' bottles. (Rec., 2026-7):

"You asked why we had our 'Koke' crowns—those marked *Plaintiff's Rebuttal Exhibits* 101 *and* 102,—printed in that color, and on that silver background; why, just showy, I suppose, is why. We had *other crowns like that*, red, on a silver background, with a red circle around them. ***

"Q. Do you think anybody would mistake that crown for a 'Coca-Cola' crown? A. Not the *reading* of the crown.

"Q. Well, do you think the *general appearance* of the crown—anybody would mistake it? A. The only resemblance between that and the 'Coca-Cola' crown is a little flourish on the letter.

"Q. And you think anybody could tell that right off? A. I think they could."

S. B. CHRISTY, the partner of J. W. Huggins, (Rec. 2029-30):

"I would not be able to tell you when we began to use the crown marked *Plaintiff's Rebuttal Exhibit No.* 101,—probably 1905. *** At that time *** *a good many of them had crowns like those*—I mean red, on a silver back ground. I suppose crowns like that, the red letters on a silver back ground, with a red ring around them, were *in general use* at that time (in 1905). There was no objection to our using them at that time."

No one would be likely to mistake one of defendants' crowns for those of the plaintiff, and this is practically admitted by H. B. Pierce, plaintiff's chief detective (Rec., 2137), and Reed and Rogers investigator, Wilkins (Rec., 887).

DEFENDANTS HAVE THE RIGHT TO USE RED BARRELS.

Plaintiff contends that it alone has the right to paint its syrup barrels with red paint which, solely because of

its unusual cheapness and marked durability, is in common use for painting soda fountain syrup barrels.

Plaintiff's contention is purely technical because consumers do not see the barrels, the defendants product being either sold in bottles or dispensed from a soda fountain, the syrup barrels being in the store room of the bottling plant or retail shop. Furthermore, the contention is wholly untenable unless the color of plaintiff's syrup barrels is distinctive. It was upon this theory that the District Court based its action and quoted in support thereof from the *Gay-Ola* case (200 Fed., 720), the following extract:

> "The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was *exclusive* in this trade. *No other manufacturer of analogous or competing drinks uses that color of package.*" (Rec., 240).

But the record shows not only that manufacturers of competing drinks use red barrels but that such use is practically universal in the soft drink trade.

A. G. Morse Co. v. Walter M. Lowney Co., 256 Fed., 935 (Carpenter, J.):

> It may be that the enthusiastic Cunningham believed he was doing something sharp in suggesting the use of the red box, and it may be that defendant had the same idea, but an unlawful intent is immaterial so long as the one inspired by it remains within the law. While I do not think the record here discloses any unlawful intent on the part of the defendant, nevertheless, if it did, and the defendant made use of none other than lawful

means to make its unlawful intent effective, the complainant has no redress. *Centaur Co. v. Marshall*, 97 Fed., 785, 38 C. C. A., 413; *Postum Cereal Co. v. American Co.*, 109 Fed., 848, 56 C. C. A., 360.

The evidence showing the general use of red barrels for soft drink syrups and the reason for such use is set forth in Schedule VI, Vol. 2.

DEFENDANTS ENTITLED TO MAKE THE COLOR OF THEIR DRINK CONFORM TO THE FIXED, STANDARD COLOR OF ALL COLA DRINKS.

The color of Coca-Cola is not distinctive, and never has been. Tonic, health or drug drinks have had this brown (caramel) color since long before Coca-Cola was first made. Plaintiff's predecessor merely made the color of his drink conform not only to that of French Wine Coca, which he manufactured, but to that of the tonic or drug drinks then on the market, including sarsaparilla, root beer, and Moxie. All drinks made of roots, herbs and drugs have always been given that color.

Moxie, whose success antedated the introduction of Coca-Cola, was not only a beverage, but was held out to the public as a remedy for all nervous disorders which a coca preparation could benefit. (See foot notes, 9, p. 37 and 13, p. 147). It had exactly the color of root beer and sarsaparilla and this color was copied exactly when Coca-Cola was first made.

Eisenstadt Mfg. Co. v. J. M. Fisher Co., 232 Fed., 957, (Brown, J.):

"The proofs do not show whether, as matter of fact, the defendant copied the article made by Bullard Bros. Company or that made by the plaintiff, nor does this seem to be of importance, for in either event the article in design and structure must be considered an old article of manufacture, and both plaintiff and defendant as copyists. If plaintiff's and defendant's articles are so similar that one may be mistaken for another, it seems also true that both are likely to be mistaken for articles previously manufactured by Bullard Bros. Company. ***

The first copyist, by the claim that other copies may be mistaken for his copy, cannot abridge the rights of other copyists to follow the original design.

If we extend the established doctrine of trade dress, and say that the article itself may in some cases become a sign of authorship and origin, it could only lead to confusion if we should go further and follow this by saying that the best known manufacturer of copies, whose product may be even better known than the product of the original manufacturer, may enjoin others from copying because the public may be misled into buying the product of a later copyist as and for the product of an earlier copyist. ***

The plaintiff has failed to show that the goods of its manufacture have in fact a distinctive appearance, which in itself points to the plaintiff as manufacturer. On the contrary, it appears that in appearance, they are indistinguishable from those of an earlier manufacturer. ***

There has been some confusion of goods, but this results from the fact that both with equal right make the same article. The defendant's conduct does not, in my opinion, amount to fraud, actual or constructive; and if the defendant's competition interferes to some extent with the plaintiff's business scheme, this is merely because there is competition, and not because there is unfair or unlawful competition.

In *Coca-Cola Co. v. Williamsburg Stopper Co. et al.*, Vol. 2, of the Trade-Mark Reporter, Page 234, Judge Hough, presiding in the District Court for the Southern District of Southern District of New York, said:

> "It is in my opinion a mistake for courts to go beyond the broad and very general principles of the law of unfair competition.
>
> "Being also of opinion that, more and more, men of experience are departing from the doctrine that the basis of unfair competition law is the protection of the public, and coming to the firm proposition that what is entitled to protection is complainant's property rights, the basic question is always this: What is the *thing* which the alleged infringer has the right to make and sell?
>
> "Here the *thing* is to be disassociated from all such extraneous matter (however important) as trade-marks, packings, wrappers, dress, advertising, and the like.
>
> "Every observer has probably noted some things in common use made by many manufacturers, yet resembling each other, especially in color. Thus there are many white soaps, red dentifrices, and green hair washes; and many people know that these colors are not essential. In this prevailing similarity of color there is a certain amount of imitation. I do not think it can be avoided, nor that it should be prevented. If one manufacturer can appropriate a brown summer drink others in other businesses can do the like,—the primary colors are soon exhausted, and it needs very little of the spirit of prophecy to see the courts regulating shades of color as between different proprietors, with results besides which some judicial efforts in the way of labels would rank very high.
>
> "As applied to this case, I think that not only are Cola drinks open to the world, but brown Cola drinks are similarly open, or, in other words, that the unpatented article made by complainant is a

> *thing* (color and all) which anyone can make and vend in competition with complainant, and ought to be permitted to do so. *** I think the defendants may choose and use the same shade of brown as does the complainant, just as freely as any butter manufacturer can make his butter of the same shade of yellow as that affected by the most popular brand he knows of,—butter, I believe, being naturally whitish in color, at most seasons of the year."

In *Coca-Cola Co. v. Branham,* 216 Fed., 264, the Court said:

> "According to the testimony of plaintiff's agent, there are 181 beverages having practically the same color as 'Coca-Cola'."

In *Coca-Cola Co. v. Glee-Nol Bottling Co.,* (MSS Opinion), the District Court said:

> "In my opinion the defendant, the Glee-Nol Bottling Co., had the right to make a beverage and color it exactly the same as the Coca-Cola beverage."

The decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 221 Fed., 61, 62, the Court stating:

> "There are many other drinks on the market which have practically the same color as that as each of these two."

The District Court based its decision as to the color of defendants' drinks on the case of *Coca-Cola v. Gay-Ola Co.,* 200 Fed., 720, but in that case the defendant took no proof (200 Fed., 722). The plaintiff's case was made out on affidavits from which it appeared that the color of Coca-Cola was *distinctive.* From the proofs

in the case at bar, it appears that the Court in the *Gay-Ola* case, was misled as to the facts by plaintiff's affidavits, just as was the Court in *Howard Dustless Duster Co. v. Carleton,* 185 Fed., 999, by a stipulation. In this case, the Court said:

> "The defendant *** has begun to make dusters which are used for the same purposes as those first introduced upon the market by the plaintiff. He makes them of white cheese cloth, and takes the trouble to dye the cloth black. No other competitors of the plaintiff dye their cloth black. *** The black color is in no sense necessary, and its use must, in my opinion, lead to confusion, uncertainty, and loss of trade, which by right belongs to the plaintiff. The first prayer for relief ought to be granted."

The case again came before the Court (187 Fed., 472) on motion to have the stipulation on which the Court acted, set aside, it appearing that the plaintiff and defendant were not the only manufacturers who dyed their dusters black, and the Court said:

> "The opinion of March 9th, was based upon my conception of the situation between the parties, as evidenced by the facts set up in the complaint, which were admitted to be true by the demurrer. I understood from the bill that the plaintiff was the first party who dyed white cheesecloth black, at unnecessary trouble and expense to itself, for the sole purpose of giving the duster a distinctive appearance which would point to it as maker, and that no competitors had dyed their cheesecloth black until this defendant invaded the market. With those facts, and especially the latter one, absent from the case, the opinion of March 9th, would not have been promulgated and the bill would have been dismissed on demurrer, without comment.
>
> "It would seem that my position in the matter

ought to have been easily understood from the language used in the opinion. I referred therein to the fact that defendant took the trouble to dye his cloth black, and that '*no other competitors of the plaintiff*' dyed their cloth black. I am now informed that at least one competitor, and that a strong one has for many years made a duster which it dyed black.

"The only issue between the plaintiff and that competitor, as I understand it, would be as to which party first adopted the practice. It is plain to me, however, that the exact date of beginning is immaterial. If the other parties began to dye their white cheesecloth black before the plaintiff had continued that practice a sufficient length of time to have made its black cloth a distinctive sign, pointing directly and exclusively to its factory, the entire structure upon which my final conclusion was erected crumbles and falls to the ground. ***

"As for the plaintiff, the lenient view of the matter is that it did not realize that it fundamentally affected its rights against this defendant to bring into strong relief those competitors who used other colors than black, and to refrain with exceeding care from mentioning those who did use the black."

The proofs set out in Schedule VI, Vol. 2, show that the brown shade of the drinks of the parties corresponds to the ancient, fixed color of all tonic or drug drinks and to the standard color of all cola drinks. From this, it necessarily follows that defendants are entitled to use this color without other restrictions than obtain in the sale of red strawberry soda, yellow orange soda, or other beverages whose color runs true to type.

CONCLUSION.

For the reasons herein indicated, it is submitted that the ruling of the Circuit Court of Appeals as to plaintiff's unclean hands should be affirmed and the rulings and action of the District Court reversed.

Respectfully submitted,

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No. 3[redacted]101

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

The Coca-Cola Company,
Petitioner,

vs.

The Koke Company of America,
The Southern Koke Company, Ltd.,
The Koke Company of Texas,
The Koke Company of Arkansas, and
The Koke Company of Oklahoma,
Respondents.

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Schedules I to X and Appendices Nos. 1 to 5, To Brief for Respondents.

VOLUME 2.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

The Coca-Cola Company,
Petitioner,

vs.

The Koke Company of America,
The Southern Koke Company, Ltd.,
The Koke Company of Texas,
The Koke Company of Arkansas, and
The Koke Company of Oklahoma,
Respondents.

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Schedules I to X and Appendices Nos. 1 to 5, To Brief for Respondents.

VOLUME 2.

SCHEDULE I.

THE MARKS "DOPE" AND "KOKE" DO NOT DECEPTIVELY RESEMBLE THE MARK "COCA-COLA."

Coca-Cola Co. vs. Branham, 216 Fed., 264;
Coca-Cola Co. vs. Koke Co. of America. Exhibit E, Appendix to Petition for Certiorari, p. 65.

Admissions of Plaintiff's Witnesses.

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn., who formerly bottled a product which he labeled "Koke" in the identical style of type as that used by defendants:

"Q. Mr. Huggins, did you consider that your trade-mark 'Koke' so nearly resembled the trade-mark 'Coca-Cola' as to be likely to cause confusion in trade, or to deceive purchasers? A. I do not think that there was but very little resemblance in the forming of the two words,—in the formation of the two names.

"Q. Well, did you think there was *any* resemblance between them, in *sound, appearance or suggestion?* A. *No, sir; not between 'Coca-Cola and 'Koke.'*

"Q. You consider them *entirely different words?* A. *I consider them entirely different words.*

"Q. Not only in the *appearance*, but in the *sound* of them? A. *Yes, sir.*

"Q. And in their *significance?* A. *Yes, sir.*" (Rec., 2019-2020).

S. B. CHRISTY, the partner of J. W. Huggins in the "Coca-Cola" bottling business at Murfreesboro, Tenn., and who was formerly the partner of Huggins when he bottled the product "Koke":

"Q. Did you think you had a right to put this name 'Koke' on there? A. The Government thought so.

"Q. Didn't you know this name 'Koke',—anybody looking at it would right off think it was *'Coca-Cola'?* A. *No, sir.*" * * *

"Q. Didn't you know that the appearance of that word 'Koke', as it is written on that label marked *Defendants' Exhibit No. 24*, looks so much like 'Coca-Cola' that you cannot tell the difference? A. *No.*

"Q. You mean to say it looks *different from* 'Coca-Cola? A. *Yes.*

"Q. You mean to say that *anybody can tell the difference right off?* A. *Anybody that could read, they could.*

"Q. But, as a matter of fact, however, it *sounds* just like the four syllable name 'Co-ca-Co-la', don't it? A. *No.*

"Q. You think *anybody could tell the difference in sound* between the word 'Koke' and the word 'Coca-Cola'? A. *Yes.* Rec., 2030-2031) * * * Q. Don't you know, Mr. Christy, that you adopted that name 'Koke' for the sole and only purpose of enabling you to substitute your beverage for 'Coca-Cola', and pass it off to the public and fool them and make them think it was 'Coca-Cola'? No, we did not try to fool them that it was 'Coca-Cola', because *they knew it was not 'Coca-Cola'.* Q. *How* did they *know* that it was *not 'Coca-Cola'?* A. We advertised it as *'Koke'*. (Rec., 2032-2033).

H. B. PIERCE, the chief detective for the Coca-Cola Co. in charge of working up the facts in this case:

"Q. Does the name 'Dope', as it appears on the caps of the defendants' bottles, look like the name 'Coca-Cola'? A. *Only the script* or *style of letter* used. * * * Q. Do you think you would mistake *that* for the name *'Coca-Cola'* on the crown of the Bottle? A. Not I, *I would not.* Q. Do you think

anybody would? A. They may; I do not know. Q. Do you think *any rational being, anybody with common sense* would? A. I do not know. (Mr. Hirsch: I object to that. *He* don't know what a *rational being with common sense* would do). Q. Would you mistake the [word] 'Koke' written in [script on the] caps on defendants' bottles for the name 'Coca-Cola'? A. No." (Rec., 2137).

GEORGE H. WILKINS, the private detective in the employ of Messrs. Read & Rodgers, attorneys for the Coca-Cola Company, Chicago:

"I purchased these three green bottles, Exhibits Nos. 180, 181 and 182, in New Orleans. I took these bottles out with me after buying them because I wanted evidence that they were substituting and selling 'Koke'. When I bought these bottles I knew all the time by looking at the bottles, that they were not 'Coca-Cola'. Yes, sir, when I saw the bottle I did. But in the case of the Comus, I did not see the bottle. The man wrapped it in a newspaper and handed it to me. No, I would not know whether it was a bottle of 'Koke' or Ginger-Beer if it was wrapped in a newspaper. When I saw the bottle I knew that it was not 'Coca-Cola'. In the places where I did see the bottle before purchasing same, or at the time of my purchase, I knew it was not 'Coca-Cola' I was purchasing, that was why I wanted the bottle. (Rec., 883-884) *** You ask if I did not know that these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case they were wrapped up. Of course I could not tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew they were not 'Coca-Cola'. * * * You say that of course if he covers it one could not tell whether it is a bottle or not; but you say you mean if I looked at it; if he handed it across I would know that it was not 'Coca-Cola'. You ask if I would know that as

soon as I saw the crown; to the best of my knowledge it would not be 'Coca-Cola' with a 'Koke' crown. * * * No, I do not mean to tell you that that looks anything like 'Coca-Cola' to me now, because I have handled too many of them. I do not believe it did look like to me 'Coca-Cola' the first time I saw it." (Rec., 886-887).

FREDERICK CONWAY PEACE, an ex-Pinkerton detective, in the employ of the Coca-Cola Company to work up the facts in this case:

"You ask if I have seen the bottled 'Koke' or 'Dope' put out by bottlers, yes, sir, but not in Dallas, I saw them down in Mississippi. Yes, sir; the crown was on them. Yes, sir; I have also seen the bottled goods sold at various places with the name 'Dope' on the crown—it would not be anywhere else on the bottle. It was not blown in the glass, and *when the crown was pulled off* and the consumer had got the bottle, *he could not tell what was in the bottle; it would not be labeled then.* (Rec., 2216).

GEORGE J. MARTIN, a traveling salesman for the Coca-Cola Company:

"Yes, I have drunk 'Koke'. Q. You could tell right off it was not 'Coca-Cola', couldn't you? A. Well, of course, I got it out of a *'Koke' bottle* * * * If he had given it to me *and I had not seen the label on it*, I don't know what I would have thought." (Rec., 345).

E. R. ALBRIGHT, a member of the firm of Albright & Wood, which operates two drugs stores in Mobile, Alabama:

"I wanted the stuff ['Koke'] shipped *without the labels*, because I did not care for my customers to

know that I was using the stuff at all; if they knew it, they might use it in an unfair way to say that I was using it instead of 'Coca-Cola'. (Rec., 548.

DAVE S. BAUER, a retail druggist, Mobile, Ala.:

"I had given instructions to my soda dispensers to make inquiry of purchasers who asked for 'dope' and 'coke' if they wanted 'Coca-Cola'. When they say 'Give me just what we ask for', we say, 'Well, we do not carry anything but Coca-Cola.' In a good many instances they stated 'Look here, I did not come in here to be jollied. I came in here to get what I want.' The dispensers would then say, 'We just don't serve anything else but 'Coca-Cola', and this card would be shown to the purchaser, and in a majority of cases the fellows would just tell what they wanted. The card referred to is the one marked *plaintiff's exhibit* 100. Of course I watched this pretty close to see what effect it would have on my business, and visited my soda fountain more often than usual, and whenever I seen that card shown them, without one exception I heard the reply, 'Say, I want Coca-Cola. I did not know there was *two* drinks. I did not know there was *another one like that.*'" (Rec., 537).

JOHN CAIN, a hired spotter for the Coca-Cola Company:

"The way I know they handled it ['Koke'] is because Mr. Rausch told me that he handled it. He told me that that day I went down there. He has got a bottle down there that you can see it—it's syrup, a bottle of syrup. It's the syrup up there—*'K-O-K-E'—as big as life.*" (Rec., 626).

D. P. ENGLISH, a retail druggist, Dallas, Texas:

"They got this product 'Koke' to which I refer

from the Koke Company in Dallas, Texas, in barrels colored red. There was very little difference between their barrels and the Coca-Cola barrels—you would not notice it without examining the 'Koke' and *saw* [seeing] *if the 'Koke' label was on the end.*" (Rec., 802).

CLARENCE J. HOGAN, a Pinkerton detective employed by the Coca-Cola Company as a spotter:

"We have produced all the 'Koke' that was offered us for 'Coca-Cola'. You say you take it for granted that we were not deceived when we got it: why, sure not. We were out hunting for it and when we got it we simply picked it up and took it out. Sure we knew what it was when we got it." (Rec., 649-650).

FRANK J. BOGNER, another Pinkerton detective employed by the Coca-Cola Company as a spotter:

"Yes, sir, we produced all the 'Koke' we got in our search. We were employed to get that stuff if we could; we went out to see if they would sell us 'Koke' for 'Coca-Cola', and when we got it we wrapped it up and put the name of the party we got it from on it. We went to see if we would get a substitute for 'Coca-Cola' or not, and when we got it we got what we were searching for, got the evidence against him. Of course, when those fellows gave us a bottle wrapped up we knew we had them." (Rec., 653).

B. J. GILLION, still another Pinkerton detective employed by the Coca-Cola Co. as a spotter:

"In each place we went to we called first for a glass of 'Coca-Cola', and they served us out of the bottle —they poured it out of the bottle into a glass, we drank from the glass. * * * When we drank the

drink we asked for a bottle of that drink under some circumstances and under other circumstances we did not ask for it. In each instance I saw the drink which was served us in the bottle in which it was served, and in those cases where we got a drink in a glass, I knew what the bottle contained before I drank the stuff, so that I was not deceived at any time by what I drank. In each instance where I ordered the drink and got it in a glass and followed it up by an order of a bottle, in each such instance I saw that it was a bottle of 'Koke' that had been served me in a glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, I was satisfied it was 'Coca-Cola'." Rec., 661-662).

SCHEDULE II.

Testimony of Defendants' Witnesses as to the Meaning of "Coke" and "Dope".

MAX BLOOMSTEIN, a retail druggist for 30 years, Nashville, Tenn. (Rec., 1145-7):

"We handle 'Coca-Cola', and Diehl & Lord's 'Star-Cola', and 'Koke' and 'Dope'. I am about the fountain frequently, and can hear the words our customers use in asking for the different drinks they want. * * * The words 'coke' and 'dope' are used very largely, generally signifying that they want any stimulating drink that has caffeine in it. * * * Generally it means just any of them. Any drink with caffeine,—any stimulating drink—is called for by the name of 'coke' or 'dope'. When a customer comes in to our soda fountain and asks for a 'coke' or a 'dope', right now he is served with the 'Koke' or 'Dope' preparation made in Chattanooga. Before that was put on the market he was usually served with 'Star-Cola', made by Diehl &

Lord. When a customer comes in and asks for a 'coke' or a 'dope' and is served with Diehl & Lord's 'Star-Cola', I surely consider that I am giving him what he asked for. I have heard these words 'coke' and 'dope' from five to ten years, I cannot state exactly. The words 'coke' and 'dope' mean to me any drink having caffeine or stimulant in them. I regard these names 'coke' and 'dope' as nicknames designating a class of drinks, rather than a specific drink. I cannot say just exactly where that slang 'coke' and 'dope' originated. I presume it originated because it just had the same effect. I have heard the word 'dope' as applied to cocaine, to morphine, and heroin, before I ever heard it applied to the drink, quite a number of years ago. I have no way exactly of knowing how long. I have heard it applied to the drinks, but 'dope' seems to me to be something that stimulates, or makes you feel a little better, or a little different from what you ordinarily did. It was originally applied to morphine and cocaine, because it temporarily rejuvenated a man, and I think it was applied to 'Coca-Cola' just after having been applied to the cocaine and morphine drugs, that is my idea. I have known, ever since I have known drinks, just what was in them. I do not know whether the ordinary layman who drinks them knows what it is in them, but I have always known why they stimulate, and why they have that effect. There is caffeine in them. *Caffeine is referred to by the public frequently as a 'dope'.*"

JOHN R. PARDUE, soda dispenser, Nashville, Tenn.:

"Some of the cola drinks we have are 'Koke', 'Dope', and 'Coca-Cola'. Others I have dispensed since I have been dispensing soda water are 'Star-Cola', 'Fletcher's Cola',—I believe those are about the only ones. I have been dispensing soda water about ten years, I think. * * * Some customers

called for 'Coca-Cola', some for 'dope' and some for 'coke'. We have had a few calls for 'shot-in-the-arm'. * * * When they ask for 'coke' or 'dope' they want something of that class,—a cola drink. When a customer comes in and asks for a 'coke' or a 'dope', I do not understand that he is making a specific or definite request on me for 'Coca-Cola' exclusively. I frequently go into soda fountains myself and ask for cola drinks. I ask for them as 'coke' or 'dope'; it makes no difference to me so as I get a cola drink. (Rec., 1133-4). * * * 'Coke' and 'dope' is just a nickname applied to cola drinks. *I suppose it arose something on the cocaine idea,—about cocaine being in the drinks,—in 'Fletcher's Cola', 'Coca-Cola', and several other drinks.* * * * I have heard that it was in all cola drinks. I have argued that with customers at the soda fountain, —that there was cocaine in cola drinks, 'Koke', and 'Dope', or 'Coca-Cola'. I first heard the expressions 'coke' and 'dope' some ten or twelve years ago, I think. * * * The reason the nicknames arose was on account of the discussion as to cocaine, that is my idea. * * * I have heard of cocaine in regard to 'Coca-Cola' and 'Fletcher's Cola' *and all of them.* (Rec., ,138-9). * * * They just said all Coca-Cola and dopes all had dope in it, and I heard that about ten years ago, and we have discussed that ever since. (Rec., 1140). * * * I do not know how these names 'coke' and 'dope' originated, except the discussions about cocaine. * * * We have more calls for just 'root beer' than for 'Hires root beer'. Like you go up to a bar and call for a beer, there don't every one go up to a bar and say give me a certain kind of beer, they just say they want a glass of Root Beer. When people ask for 'coke' and dope', they want a cola drink,—a stimulating drink. * * * Customers tell me it is all a dope, is all I know about it, and a dope will make you feel good, it will liven you up, it comes from stimulation. A 'dope-fiend' is a fellow that takes 'dope',—it is something

that livens you up, makes you feel good,—it is a drug." (Rec., 1143-4).

A. S. JOSEPH, proprietor Woodward Bar, Birmingham, Ala.:

"During the time I have been at that bar I have dispensed all the different colas,—too numerous for me to remember the different names. Some of them are 'Chero-Cola', 'Coca-Cola', 'Nifti-Cola', 'Gay-Ola', and others. I do not know how many of these cola drinks are on the market here in Birmingham,—possibly 8 or 10. (Rec., 1331). * * * In asking for these different cola drinks some customers specify what they want, and others do not. I hear the word 'dope' used very frequently. When they ask for a 'dope' I get them the first thing I put my hands on in the soft drink line. I am about the bar myself six to eight hours a day. * * * I hear the customers ask for drinks they want. When a customer comes in and asks for a 'dope', I do not consider that he has made a specific and definite request on me for 'Coca-Cola'. The general impression is that all these soft drinks *along that line*, whether designated by one name or the other, is all on the 'dope' order,—'coke' order; some call it 'dope' and some call it 'coke'. 'Dope' means to me ordinarily a narcotic. I have an idea why they call these drinks 'dope'. I think that the advertising that the public has got out of the newspapers at various times when these suits were brought kind of educated them along the lines of what they contain, or at least gave them the impression that *all these 'dope' drinks contained some kind of 'dope' or 'coke' on the order of a narcotic*, and they would come in and say, 'give me a "dope", or 'a "coke",' under the impression that they are going to get some percentage of narcotic. * * * The general discussion among the consumers of these colas is that all cola drinks contain some percentage of narcotic. * * * It has been created in the mind of

these people that it is the game to play, that there is a slight percentage of narcotic in these drinks, and they cannot go up against morphine or cocaine, so they play the other. * * * *The impression has been created, and still exists, that all cola beverages contain a percentage of narcotic.* * * (Rec., 1332-3). * * * When a man comes into my place of business and asks for a 'dope' or a 'coke' I give any soft drink; it does not make any difference, just the one I put my hand on. I do not consider 'dope' and 'coke' names for lemon soda, strawberry soda, or anything; that is *soda water*, and they have an entirely different purpose. That [the cola drink] comes under a head of entirely different beverages from sarsaparilla and lemon soda. What we give them when they ask for 'coke' or 'dope' depends upon what brand of goods we handle; we might have three or four different brands, such as 'Chero-Cola', 'Coca-Cola', 'Nifty-Cola'. * * * That impression arose with regard to the impression about 'Koke',—'K-o-k-e'—that it had this narcotic in it, because, when they speak of morphine or cocaine, they designate it as 'coke'. 'Coke' would designate cocaine or morphine, and the impression is that 'Koke' has cocaine or morphine in it. * * *' (Rec., 1334).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola", Nashville, Tenn. (Rec., 1091):

"Customers ask for my product at the soda fountain as 'cola', 'coke' and 'dope'. I have heard these words 'coke' and 'dope',—I do not know that I could say that I have paid any very great attention to it, only in the past few years, probably. I do not know that I have paid particular attention to it, —since the last four or five or six or seven years, probably. It may have been longer than that, but I do not know. The word 'dope' means to me that they want a caffeine drink. * * * The word 'coke' means the same thing. If a man asked me to take

a 'dope' with him, I would naturally think it was a caffeine drink, whether it was 'Coca-Cola', 'Gay-Ola', 'Rye-Ola', my own drink, or some one else's. I do not think the public would care what it was, whether one or the other, so they got a drink that satisfied their palate, and was strong enough in caffeine to feel it, you might say."

F. C. DORIDER, for 27 years in the confectionery and soda business, Nashville, Tenn. (Rec., 1195-7):

"I have heard customers come in and ask for 'coke', or 'dope'. Well, if we had a customer that was drinking 'Coca-Cola', we naturally gave him 'Coca-Cola' when he called for 'dope'. We had 'Celery-Cola',—and when they called for 'dope' *and we knew they had been in the habit of drinking that*, we gave them 'Celery-Cola'. We gave them 'Celery-Cola' or 'Cola-Ade', as a great many of them were in the habit of calling for 'dope' like they do right now. * * * My impression is I first began to buy that 'Celery-Cola' from him [J. C. Mayfield] 12 or 15 years ago, I cannot recall exactly. We handled different kinds of cola,—'Cola-Ade', 'Celery-Cola', 'Coca-Cola' ,and a good many of those colas, I cannot recall them. * * * I was about the soda fountain frequently myself so I would hear the names people used in asking for the drinks. * * * I never heard of any kicks. Of course, the boy at the fountain is supposed to know what he is giving out to them; if they called for a 'dope' and he did not know what they wanted, he would ask. If any one came in and asked for 'dope', I would ask him what he wanted. * * * Some of the names they called for were 'Cola-Ade',—we sold a great deal of 'Cola-Ade' for a while,—'Celery-Cola', 'Coca-Cola', whatever cola we had. *We had customers come in and ask for a 'dope', and when I asked him what he wanted, he would reply that he wanted a 'Cola-Ade',—every day they done that.* 'Celery-Cola' is

what the most of them said they wanted. (Rec., 1195-6). * * * When a customer would come in and ask for a 'dope' or a 'coke', I do not consider that he had made a definite and specific request on me for 'Coca-Cola' alone,—not unless we knew he was drinking it; I mean a regular 'Coca-Cola' drinker that I knew wanted 'Coca-Cola'. The word 'dope' means—well, I suppose the cola people are supposed to give people the impression that they put cocaine in it, and I think the word 'dope' came from that; I don't know whether the rest of them did or not, but I always thought they did. The word 'dope', as applied to soda fountain drinks means no particular drink. We consider it applies to these different drinks, like 'Cola-Ade',—anything with the name cola to it. I think they have been serving 'Star-Cola' the last year or two at the ball park. Most everybody calls it 'dope',—'Give me a "dope", boy',—I suppose they know what they are getting; I think there is something on the bottle to indicate what it is,—I never noticed the bottle carefully. I hear lots of the boys dispensing 'Star-Cola', calling 'dope',—some say 'Star-Cola' and some say 'dope', and different kinds of things. These words 'dope' and 'coke' are used in the trade to designate cola drinks as a class. I heard these words 'coke' and 'dope' fifteen or eighteen years ago, I reckon. I think during that time they have had the same meaning that they have now. If a customer fifteen or eighteen years ago would come into our soda fountain and ask for a 'dope', if we did not know what he wanted, *we would ask him what he wanted;* we consider two or three of them 'dopes'." (Rec., 1196-97).

C. P. EMBREY, a retail druggist, Chattanooga, Tenn. (Rec., 1019-21):

"I dispense soft drinks at my soda fountain. I dispense cola drinks there. I dispense 'Coca-Cola', and one named 'Ko-Nut'. * * * There are so many,

nearly everybody who opens his grip when he comes in has a cola syrup to sell, and, naturally, you would not remember all that comes around; there is a great many cola drinks on the market. (Rec., 1019). * * * When customers call for 'dope' we give them the one we make the most money on. I do not regard the word 'dope' as a specific and definite re-request for 'Coca-Cola', exclusively; I regard it as a nickname for that class of drink. I have heard the word 'dope', I will say, ten years, but during all that time it had the same meaning to me that I have just stated. *'Dope' at a soda fountain means a drink that exhilarates, like [a] caffeine drink*, and 'dope' at a prescription counter means some narcotic used in an abnormal way, or used in excess,—that is the way I look at it. The way I look at it, it has been in litigation that 'Coca-Cola', or any of those dope products, are injurious to you, you see, and then people just got the idea that the drinking in excess would injure,—that is the way the public would think, whether it was true or not. * * * We do not handle 'Hires root beer'; we have not for years. * * * I have had calls for 'Hires root beer', and told them that we did not handle that, but handled Smith's root beer. The customers would be satisfied. They wanted a drink of that main general description. The same situation applies to the cola drinks." (Rec., 1020-1021).

F. M. BOGART, prescription clerk and soda dispenser, Chattanooga, Tenn. (Rec., 1070-1):

"I am about the fountain frequently and can hear calls people make for the different drinks they want. We serve 'Coca-Cola', 'Ko-Nut', 'Afri-Cola' and 'Mays-Ola'. * * * In making known to me the different cola drinks they want, some say, 'Give me a dope', 'a shot-in-the-arm', 'shoot me'. *I understand when they ask for those names they want some stimulating drink.* I do not understand that

they have made a definite and specific request for 'Coca-Cola' exclusively. I do not think these nicknames specify any certain brand of drink. We give them, when they call for these different names, just what we happen to have, 'My-Ola', 'Mays-Ola'. * * * I have never had any of these cola drinks, other than 'Coca-Cola', rejected by a customer on the ground that it was not what he asked for, when served in response to a request for 'a dope', or 'a shot', or 'shoot me', or anything of that kind. * * * When people call for 'dope', 'shoot me', or 'shot-in-the-arm', I just imagine they want something to stimulate them,—dope."

E. A. SHARP, proprietor of the Terminal Pharmacy, Jacksonville, Fla. (Rec., 1250-5):

"We dispense ice-cream sodas, root beer, 'Coca-Cola', 'Dope', 'Brain-Ol', 'Gay-Ola',—you know about the line of stuff. We handled all those. We do not dispense 'Gay-Ola' right at the present time. * * * When a customer comes into our soda fountain and asks for a 'dope' or a 'coke', I do not consider that he had made a definite and specific request on me to serve him with 'Coca-Cola' only (Rec., 1250). 'Dope' and 'Koke' are similar to 'Coca-Cola', because they both contain about the same constituents,—caffeine. That is the reason people call it 'dope',—because it is a cola drink with caffeine. Before we handled 'Koke' and 'Dope' we used to handle a cola, and perhaps when a man wanted a 'dope' or a 'coke', we gave him 'Brain-Ol', or 'Coca-Cola',—anything we wanted. * * * If a man asks for 'Coca-Cola' he wants 'Coca-Cola', and if he asks for a 'dope' he means most anything *in that line.* (Rec., 1253). * * * When a man came in and asked for a 'dope' or a 'coke', we took it for granted he meant a cola drink; that that was a dope. (Rec., 1254). * * * I never thought 'coke' and 'dope' were nicknames for 'Coca-Cola',—not neces-

sarily. My estimation of the term is that it is a cola drink." (Rec., 1255).

R. K. SMITH, head dispenser of the United Cigar Stores, Nashville, Tenn. (Rec., 1187-1191):

"We handle 'Coca-Cola', that is the only one. We have people come into our fountain and ask for 'coke' and 'dope'. If it should be a regular customer that I have been in the habit of serving at all times and know what he drinks, I give him 'Coca-Cola', if that is what he drinks; otherwise, if he asks for 'coke' or 'dope', I ask if he wants 'Coca-Cola'. * * * *I think that 'dope' would mean any kind of stimulating drink*, or caffeine, such as that,—headache medicine,—or 'Coca-Cola', as a lot of people call that meaning 'Coca-Cola' when they say 'dope'. I have known of 'Fletcher's Cola' and 'Dope'; they are about the only two colas that I have seen. I have heard of more than that, I suppose, but not very much. If a customer came in and asked for a 'coke' or a 'dope', I do not know anything he likes, and he has not been a regular customer,—why, I would give him the one I made the most on. If I had a 'dope', and he asked for 'dope', I would be giving him what he is asking for. 'Dope', in my opinion, does not exactly specify 'Coca-Cola'. I have people come in and ask for 'dope' when they want 'Capudine' or any headache medicine,—for instance, 'Bromo-Seltzer'. (Rec., 1187). * * * I do not know whether or not among our trade the fact that there are other cola syrups on the market and dispensed at the soda fountains in Nashville, is well known. There is no doubt but that it is known among some people. We have regular trade and transient trade, also; more of a regular trade than what you would call transient. When they call there, as a rule, we know what they want. * * * I have not sold anything except the straight 'Coca-Cola'. I have no other drinks similar to that one,

and, as I said a while ago, people come in and ask for a 'dope' and a great many times they mean a headache beverage, something like that,—a caffeine drink, or something stimulating. * * * I have gone into a near beer stand or saloon and got a glass of beer; *I have asked for it as 'a glass of foam', a 'scuttle of suds', or something of that sort. I expected to get whatever they were serving when I asked for the glass.*" (Rec., 1188-1191).

T. H. LEVER, manager K. W. N. Pharmacy, Spartanburg, S. C. (Rec., 1228-31):

"I dispense at my soda fountain a general line of drinks. I handle the 'Dope' and 'Koke' and 'Coca-Cola'. I know a number of others, 'My-Cola', 'Ko-Nut', 'Rye-Ola', 'Gibb's Cola',—that is a new one, just became acquainted with yesterday. I have known of cola drinks ever since I have been in the drug business,—about eight years. * * * As a rule my customers come in and call for the drink they want, sometimes, and then at others they will come in and say, 'Give me a drink'; sometimes they will say, 'Give me my dope', and any kind of—making sort of an application for a drink without designating just what they want. (Rec., 1228). * * * I have had them come in and point at the bottle of 'Capudine' and say, 'Give me my dope', or I have had them point at 'Bromo-Seltzer', 'Celery-Caffeine' or any of those headache salts, when they kind of establish themselves with a certain drink at the fountain, and in a good many instances when they come in they do not call it by its proper name, but, 'Give me a dose of my dope'. (Rec., 1229). * * * I had some 'Ko-Nut' on hand at one time, but that was before your drink 'Koke' and 'Dope' came out. Customers in asking for that drink 'Ko-Nut' called for 'dope' and I gave them 'Ko-Nut'. * * * At the time I handled other cola drinks, I understood customers wanted a cola drink when they came in and asked for a 'dope'. I did not consider that it

designated any particular cola drink, and very often I would ask them to designate the kind of drink they wanted. (Rec., 1229-30). * * * When a customer came into my store and asked me for a 'dope' I did not consider that he had made a definite and specific request on me to serve him with 'Coca-Cola' and nothing else." (Rec., 1231).

ADAM DIEHL, manufacturer of "Star-Cola", Nashville, Tenn. (Rec., 1083-7):

"We manufacture a cola drink, 'Star-Cola'. We have been putting out that drink about fifteen years. We make syrup for the making of the drink. We sell it to soda fountains and bottlers,—advertised around town and all over the United States, in the Bottler's Gazette, and that is supposed to go to every bottler in the United States. Around in Nashville we have advertised it on bill boards, daily papers, programs, these slides in picture shows. 'Star-Cola' is sold at the baseball park exclusively. We have a large sign right opposite the grand stand, which shows *'Diehl & Lord's Star-Cola and Pepsin sold exclusively on these grounds.'* We have ten or fifteen boys taking it through the audience, and they have it on their buckets, and printed across the face of their caps, and then the boys are all instructed,—and which they do,—when they go selling it [to call out] 'Diehl & Lord's ice-cold "Star-Cola" and "Pepsin" and "Digestol",'—the three drinks we sell there. We advertise also on the program. We advertise our drinks as sold exclusively at the ball park; we make that our specialty in the advertising. *Customers say, 'Give me a dope'*, 'two dopes', 'a Pepsin Nut', or 'Digestol', if there is four, —some call for 'Star-Cola' and some say 'Give me a bottle of cola.' When they ask for 'dope', 'Star-Cola' is served. They know, when they ask for 'dope' and are served 'Star-Cola', that it is not 'Coca-Cola', by the boys calling 'Diehl & Lord's Star-Cola', by the advertising on the sign, too, and by the ad-

vertisement I have put on the program that 'Star-Cola' is sold exclusively on the grounds. On the bottle is 'Diehl & Lord's Star-Cola.' The crown has also 'Star-Cola' on it. The label is blown in the glass. When a customer asks for a 'dope', I understand that he wants any cola drink. I do not regard the name 'dope' as a specific and definite name for 'Coca-Cola' exclusively. I would take it from experience,—my experience has been,—when they call for 'dope' they want ours, or whatever we have got; when they want a cola drink, they will say give me a 'dope' or 'coke',—some nickname of that kind. If a customer came into my place of business and asked for a 'dope', I would understand he wanted a box of cola drinks. There are forty or fifty other cola drinks on the market today that I know of, I could not mention them all. I have known of cola drinks on the market, I suppose, twenty-five years. (Rec., 1083-4). * * * When I talk about 'dope', or 'coke', either, it usually refers to a cola drink with me. It does not mean any special one. When I saw 'Koke' or 'Dope', it would mean with me, as a bottler, if I was going to bottle the stuff and wanted 'Koke' I would call for 'Koke Syrup'; but the general public, when they are at the parks, for instance, they would call for 'dope', that would mean they want a bottle of cola. *I have heard them call it 'coke' and 'dope'*. That is what they mean down there, —we only sell three drinks, and, when they call for 'coke' or 'dope', the boy knows he means a cola drink." (Rec., 1086-7).

W. F. BOYLIN, president of the American Label Works, Nashville, Tenn. (Rec., 1074-5):

"When I go into a soda fountain, or place where they sell bottled cola drinks, or soft drinks in bottles, and ask for a 'dope', I expect to get a cola drink. If I want 'Celery-Cola', I know I have got to ask for 'Celery-Cola'. * * * If I go in and ask for 'a coke', I expect to get any cola drink. I do not regard the

names 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. I have heard these words 'coke' and 'dope' for ten or twelve, or fourteen, years anyway,—fifteen years, I should say. * * * I regard them as nicknames for cola drinks as a class. Out to the base ball park here in the summer time there is no cola drinks sold there except Diehl & Lord's 'Star-Cola'. That is sold in bottles. I have heard them ask for it as 'coke' and 'dope'. * * * They always have signs out there, and have crowns on the bottles the boys bring out in the stand, with the name on it. When people ask for 'dope' or 'coke' and are served with 'Star-Cola', I think they know they are getting 'Star-Cola'. I have heard it asked for as 'coke' or 'dope',—nearly always in calling for a drink out there, I say, 'Give me 'a coke', or a' cola'. I do not think I am getting 'Coca-Cola' when they serve it to me. People in asking for a drink at the ball park by the names 'coke' or 'dope' can tell they are getting 'Star-Cola', and that it is not 'Coca-Cola', by the crown on the bottles, and the advertising in the park that Diehl & Lord have exclusive rights there to sell Diehl's 'Star-Cola'. Diehl & Lord have their name blown in the bottle." (Rec., 1074-5).

PAUL E. WEBB, soda dispenser, United Cigar Stores, Nashville, Tenn.:

"I have dispensed 'Fletcher's Cola', 'Diehl's Star-Cola', and some other names. * * * I am dispensing now 'Coca-Cola' only. I have dispensed other cola drinks in addition to 'Coca-Cola' at various other places I have worked. I have had customers come in and ask for drinks by other nicknames. Some of the names they asked for [are] 'coke', 'dope', 'poison', 'shot'. When they came in and asked for drinks by those names, they wanted any kind of drink they could get,—any kind of cola drink,—it did not make any difference. I did not consider, when they came in and asked for a 'coke', a 'dope',

a 'shot', 'poison', any of those names, that they were making specific requests for 'Coca-Cola' and nothing else. *I regard those names as nicknames common to the trade, referring to cola drinks as a class.* (Rec., 1119). * * * At the baseball park here at Nashville they serve 'Diehl's Star Cola' in bottles. They ask for 'coke' and they give them that. It has a red label on the bottle. The bottle has a big label on the side of it. They ask for that by 'dope' and 'coke'. I never hear any one who asked for it by 'dope' or 'coke' reject it on the ground that it was not what they asked for. They mostly call for it by 'dope' and 'coke', for it is advertised in the park. They have a large advertisement that says 'Call for Diehl's Star-Cola'. The boys carrying the containers they have for the bottles, they have labels all over the sides, 'Diehl's Star-Cola only.' The people who ask for 'dope' know they are getting 'Star-Cola'. (Rec., 1120). * * * Zeh's had 'Coca-Cola' and 'Diehl's Star-Cola'. When a man asked for 'Coca-Cola', I served him 'Coca-Cola', and if a man asked for 'dope' I served him 'Diehl's Star-Cola'. (Rec., 1121). * * * These other drinks, they are sold in bottles, that they ask for as 'coke' or 'dope'. They had great long names, and a person would not go to the trouble of calling for them, they would just call for a 'coke' or a 'dope' and get them. * * * At these places where I was and they served only 'Coca-Cola', when people came in and asked for a 'coke' or 'dope', I gave them 'Coca-Cola', *because it was all I had.*" (Rec., 1122).

BRANTS DARDEN, soda dispenser, at Henry Skagg's, Stahlman Building, Nashville, Tenn.:

"I have been a soda dispenser for about six years. Have dispensed a great many different kinds of drinks, I could not tell all of them. The cola drinks I have dispensed are Fletcher's Cola, Dope' Coca-Cola, and others. I cannot remember. I have

known of these other cola drinks, other than 'Coca-Cola', most ever since I have been in the business. I have had calls for drinks under the name of 'dope' and 'coke' at the soda fountains where I have worked. I have had customers come up and say, 'Give me a coke,' or 'Give me a dope.' I have had other names used. A lot of them will say, 'Give me a shot-in-the-arm; and different things about like that. I do not regard the words 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. When a customer comes into my soda fountain and asks for a 'coke' or a 'dope', I do not understand he has made a definite and specific request on me for 'Coca-Cola' and nothing else. The word 'dope' means to me some cola drink, a drink of *that order*. In the places where I have worked and handled 'Fletcher's Cola', and other similar drinks, when a customer came into my establishment and asked me for a 'dope', I served him 'Fletcher's Cola' at times when he asked for 'dope'. At the different fountains where I had other cola drinks than 'Coca-Cola', and customers came in and asked for 'dope', I generally gave him what I made the most money on, when they call for a 'dope' or a 'coke'. I go out to the baseball park occasionally. 'Star-Cola' is sold out there. Out there I have heard them call for 'dope', things like that, and that is what they gave me. I have heard them asked for it, 'Give me a dope'—'three dopes'—as many as they wanted, or 'Give me a cola' or a 'coke'. (Rec., 1123-4). * * * When they call for 'coke' or 'dope', as I told you, I would give them the first cola drink I came to, according to what I was handling at that time. When they called for 'coke' or 'dope' I would give them some cola drink that we handled, and was nearest to me, and sometimes 'Coca-Cola'. * * * At Skagg's place we carry 'Coca-Cola' now, that is all; we do not carry 'Fletcher's Cola'. When they call for 'dope' or 'coke', we give them 'Coca-Cola'. * * * What the people wanted when they asked for 'coke' or 'dope', I always thought they meant something

on the cola drink line, some kind. 'Fletcher's Cola' is cheaper than 'Coca-Cola'. That is *one* reason why I served 'Fletcher's Cola' for 'dope' and 'coke', —and *because it is a cola drink.*" (Rec., 1126-7).

P. E. JOHNSON, soda dispenser, Nashville, Tenn.:

"We dispense sodas of all different flavors. We dispense 'Coca-Cola' and a black syrup called 'Dope'. They used 'Fletcher's Cola', and have used 'Diehl's Star-Cola'. * * * When customers come into our fountain and ask for a 'coke' or 'dope', we serve them 'coke' or 'dope'. When we handled 'Fletcher's Cola' and they asked for 'coke' or 'dope', we served 'Fletcher's Cola', and when we were handling Diehl's 'Star-Cola', we served Diehl's. When I was serving those drinks in response to their request, I considered I was giving what they asked for. *The name of 'coke' or 'dope' means fifty, or a hundred, or more, drinks in a class.* They mean a class of drinks. I do not consider that when a man comes into our fountain and asks for a 'coke' or a 'dope' that he is making a definite and specific request on me for 'Coca-Cola' exclusively. Some of the cola drinks I know of are: 'Afri-Cola', 'Gay-Ola', 'Fletcher's Cola', 'Diehl's Cola'. And I know there are a number of different ones on the market but I do not recall their names. I have heard these names, 'coke' and 'dope', applied to soda fountain drinks since I have been going around and calling for drinks myself. * * * At the baseball park here in the summer they serve 'Pepsin' and Diehl's 'Star-Cola' and the other drinks that run in that class. Diehl's 'Star-Cola' is all that is advertised out there. The boys holler: 'Star-Cola', 'Diehl's Star-Cola'! * * * If people ask for 'coke' or 'dope' at the ball park, they get Diehl's Cola. When they get Diehl's Cola they know they are getting that because it is labeled. (Rec., 1151-2). * * * When I went there and a man came in and asked for a 'coke' or a 'dope',

I would not know what he wanted. There are so many so-called 'cokes' and 'dopes' on the market, and one specific 'Coca-Cola', I would not know, I could not state positively what he might want, but I imagine, from the advertisements, etc., that he would call for 'Coca-Cola' if he wanted 'Coca-Cola'." (Rec., 1156-57).

J. L. DUNN, a soda dispenser, Nashville, Tenn.:

"'Star-Cola' is about the only cola drink I have ever dispensed to amount to anything, except 'Coca-Cola'. I have known of other colas on the market ever since I have been in the business, and that has been about seven years. Some of the other cola drinks I know of are 'Fletcher's Cola', 'Star-Cola', 'Matthew's Cola'. We do have, and have had customers at the other places, come into the soda fountain and ask for a 'dope' or a 'coke'. When I was dispensing 'Star-Cola' and they asked for 'coke' or a 'dope', I would give them 'Star-Cola', because it was the only one I had, and I considered that I was giving them what they wanted, because they practically all knew what I had. I did not consider he had made a specific and definite request on me for 'Coca-Cola' only. * * * The words 'coke' and 'dope' mean, as applied to a soda fountain beverage, different kinds of drinks, all this kind of stuff that is trying to imitate 'Coca-Cola', it refers to the 'dope' drinks as a class." (Rec., 1158-9).

W. W. RANDOLPH, a soda dispenser, Nashville, Tenn.:

"Some of the cola drinks that we have dispensed are 'Star-Cola', 'Mi-Cola', 'Pepsin-Cola', and I guess about a dozen others. * * * I have heard of about a dozen cola drinks on the market several years back, as well as I can remember, about eight years, anyway. In asking for the cola drinks at our

fountain, customers most all of the time call for 'dope'. When they call for 'dope' I give them any of those cola drinks I happen to have at that time. * * * When customers come in and ask for a 'coke' or a 'dope', they want any of those colas, unless they specify one certain drink. I do not regard the words 'coke' and 'dope' as specif and definite nicknames for 'Coca-Cola' exclusively. When a customer came into our fountain, while I was dispensing there, and asked for a 'coke' or a 'dope', I did not consider that he had made a specific and definite request on me for a 'Coca-Cola' only. * * * They dispense cola drinks at the baseball park. They serve Diehl & Lord's cola there, that is served in bottles. They call for a 'dope' or a 'coke' or just any of those names, in asking for it out there, and are served with this Diehl & Lord's cola there. I never heard any one object to it and say it is not what they wanted, when they were served with it on a call for a 'coke' or a 'dope'. * * * The word 'coke' or 'dope' is used for all these drinks. I use it to apply to these different drinks. I do not think they only mean 'Coca-Cola' when they ask for a 'dope'. If they call for a 'dope', they do not mean only 'Coca-Cola', they mean any line of these drinks." (Rec., 1160-1).

J. M. SMITH, proprietor of lunch room and soda fountain, Nashville, Tenn.:

"I dispense everything that they sell over a soda fountain, a general line of soda fountain drinks, and the different kinds of coca-cola and other cola syrups. I have dispensed 'Gerst's Cola', 'Gay-Ola', 'Star-Cola', and now a new syrup, cola drink, put up by the Southern Fountain Supply Co., I do not remember what they call it. Customers calling for these cola drinks invariably ask for 'dope'. I have a good many customers who come in and ask for a 'Coca-Cola', and some ask for 'dope' and some ask for 'coke', and names like that. I give them,

when they ask for 'dope' or 'coke' either 'Star-Cola' or 'Gerst's Cola', or some one of these cola syrups. I have given 'Coca-Cola' under the name of 'dope' or 'coke'. * * * When customers ask for 'dope' or 'coke', I understand it is any kind of a cola drink, not a definite and specific request for 'Coca-Cola' exclusively. I am now dispensing a cola syrup that is put up by the Southern Fountain Co. I do not remember what they call it; it is put up by Mr. Matthews, I believe. * * * I call this cola syrup 'dope'. He sells it to me under that name. I understand 'coke' or 'dope' is attributable to any kind of cola drink. * * * I have heard these words 'coke' and 'dope' applied to soda fountain beverages ever since I can remember, about fifteen years, something like that. I have ben working in and around soda fountains for about that length of time. The greater part of the time I have had other cola syrups on the fountain as well as 'Coca-Cola' syrups. I never had a customer reject any of the other cola drinks, other than 'Coca-Cola', when they have asked for it as 'coke' or 'dope' and I served it to them in response to a request for 'coke' or 'dope', on the ground that it was what he asked for. They serve 'Star-Cola' at the ball park exclusively, and have done so the last two or three seasons. They ask for it as 'dope', and they serve them 'Star-Cola'. * * * 'Star-Cola' is blown in the bottle. The boys call 'Star-Cola'. I have heard some men say, 'Give me a dope,' and they would sell them this 'Star-Cola' they were peddling. * * * When customers ask for 'coke' or 'dope', I think they are asking for any kind of cola drink." (Rec., 1182-4).

J. C. PRICE, formerly soda dispenser, but now running a restaurant, Nashville, Tenn.:

"There are many different brands of cola drinks I have served. I could not call them all, I know a few,—'Arrow-Cola', 'J. D. F. Cola', 'Koke and Cola', 'Gay-Ola', 'Afri-Cola', and I have dispensed

'Star-Cola' and 'Gerst's Cola', too, and 'Coca-Cola'. I have worked here in Nashville, St. Louis, Evansville and Birmingham. At these different towns I sold different cola drinks. (Rec., 1205). * * * The words 'dope' and 'coke' mean, in my opinion, a cola drink containing caffeine. I have had customers come in and call for a 'dope' and call it its name, for instance, 'J. D. F. Cola', or 'Koke and Kola', they would prefer it to 'Coca-Cola'. * * * I have been out to the ball park here; they sell and advertise 'Star-Cola' out there. I have heard people out there, patrons, asking for 'dope' and 'coke'. I have hollered at the boy to give me a bottle of 'dope', I call it 'dope', and he would give me 'Star-Cola'. You could tell by the bottle they were not giving you 'Coca-Cola'. It says 'Diehl's Star-Cola' on the bottle, and on the crown. (Rec., 1206). * * * I do not consider, when I go into a soda fountain and ask for a 'coke' or 'dope', that I am making a definite and specific demand upon the dispenser to give me a 'Coca-Cola' and nothing else, because, if I wanted a 'Coca-Cola', I would ask for it when I went in. (Rec., 1208). * * * I do not consider when a customer asks for a 'coke' or 'dope' that he has asked specifically for 'Coca-Cola'." (Rec., 1209).

W. M. SIDEBOTTOM, in the confectionery and soda water business for thirty years, and now manager of Skalowski's, Nashville, Tenn.:

"At the establishment where I am now located we dispense *Atlanta* 'Coca-Cola', we dispense no others besides that. I have heard customers come in and ask for 'dope' or 'coke'; they did it every day. Fifteen or eighteen years ago when they came in and asked for 'coke' or 'dope', it depended upon the humor of the dispenser what he gave them; he would give them 'Coca-Cola', or whatever kind of cola we may have on hand. My opinion is that 'coke' and 'dope' apply to any cola drink, and when a man

comes into a soda fountain and asks for a 'dope' or 'coke', I do not consider that he has made a definite and specific request for 'Coca-Cola', but a cola drink, and that has been true for fifteen years anyway. The firm of Dorider & Sidebottom had the concessions at Glendale, and we dispensed, my recollection is, about three kinds of colas, 'Celery-Cola', 'Coca-Cola', and I think there was another cola on the market then. My impression is that we had three kinds of cola. Away back there if they asked for 'dope' or 'coke', we would give them either one we had." (Rec., 1163).

J. G. BOOTH, soda dispenser, Nashville, Tenn.:

"We are dispensing 'Coca-Cola' straight at the place where I am working now. I have known of cola drinks ever since I have known the original Coca-Cola; I suppose it would be five or six years. Customers come into the soda fountain and ask for a 'coke' or a 'dope', and call for lots of different names, as 'coke', 'dope', 'shot-in-the-arm', 'shoot me', anything like that, and 'Coca-Cola'. (Rec., 1169). * * * When a customer came into our place of business and asked for a 'dope' or a 'coke', I would think he was asking for a 'dope' or a 'coke', there are so many different ones on the market, I would think he was asking for a class of drink, instead of some specific drink. If he wanted the original Coca-Cola', if he is that particular about it, he ought to call for it under the real name of 'Coca-Cola'." (Rec., 1170).

MATT WILSON, a retail druggist, Nashville, Tenn.:

"I dispense 'Gerst's Cola'. (Rec., 1209). * * * I do not handle any other cola drink. Customers coming in and asking for that drink ask for a 'dope', 'give me a dope.' I serve them, in response to that request, this 'Gerst's Cola'. When customers come in and ask for a 'dope', I do not consider they are

making a definite and specific request for 'Coca-Cola'; if they did, they would ask for 'Coca-Cola'. I have had some few ask for 'Coca-Cola', and I would tell them that I did not have it, and they would say, *give me some of that other dope*. Before I went into the drug business I was in the saloon business. Ever since I can remember we handled cola drinks there. This 'Gerst's Cola', I had the syrup and made it just like I do now, made it from the syrup drawn from a spigot by adding carbonated water. Customers used the name 'dope' asking for it there. Some did not know what it was; they would say, It is better than I can get at a soda fountain.' I said, 'This is Gerst's'." Rec., 1209-10).

F. H. WILLIS, soda dispenser, Nashville, Tenn.:

"We have customers come into our soda fountain and ask for a 'dope' or a 'coke'. I give them a cola, 'Candy-Cola'. (Rec., 1191). * * * When a customer asks for a 'coke' or a 'dope', my understanding is that he wants just some cola that we might have, that we dispense there. When they ask for 'coke' and 'dope' and I serve them 'Candy-Cola', I consider we are giving them what they ask for. * * * We have always dispensed 'Fletcher's Cola'. *They ask for that as 'dope' and coke'*. I do not regard the names 'coke' and 'dope' as the names of a particular cola drink." (Rec., 1192).

WILLIAM F. DAVIS, a practicing attorney of the Nashville Bar, and president and general counsel of the Davis-Fuston chain of drug stores, Nashville, Tenn.:

"We dispense cola drinks. Some [of the] drinks are 'Coca-Cola', 'Afri-Cola', 'Fletcher's Cola', 'Ala-Cola', 'Arrow-Cola', I believe it is, 'Star-Cola', 'Gerst's Cola', not all of those at every place, at different places at different times we have used those cola drinks. * * * I frequently hear customers

come in and ask for a 'coke' or 'dope'. My instructions to the men are to sell the drink they think will give the best satisfaction. I do not instruct them to sell any particular brand of drink when a customer asks for a 'coke' or 'dope'. We give the one that has given the best satisfaction in the neighborhood, that is sometimes not the same drink in different neighborhoods. When customers come in and ask for a 'coke' or a 'dope' at our fountain, we do not understand they are making a definite and specific request for 'Coca-Cola' exclusively. (Rec., 1102). * * * I do not think we ever had anybody reject any of the cola drinks we served them when they asked for them as 'coke' or 'dope', on the ground that it was not the drink they asked for. Occasionally customers who come into our store and ask for drinks as 'coke' or 'dope', and indicate to us the particular brand of drink they want. I think probably here 'Fletcher's Cola' is called for maybe more than any other, except 'Coca-Cola'. * * * I do not regard the names 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. I regard them, particularly 'dope', as a common name [applicable] to a class of drinks, the caffeine or cola drinks. When a man comes into our establishment and asks for a 'coke' or a 'dope', and is served with 'Star-Cola', 'Fletcher's Cola', or any other cola drink at our fountain, I consider that we are giving him what he is asking for." (Rec., 1103).

SUMNER FUSTON, a stockholder in the Davis-Funston chain of drug stores at Nashville, Tenn., and manager of one of the stores:

"We have customers come into our store and ask for 'coke' and dope'. We serve, when they ask for 'coke' or 'dope', 'Fletcher's Cola'. * * * I handled *Atlanta* 'Coca-Cola' because I was out of 'Fletcher's Cola', and Fletcher could not get it to me as quickly as I liked, so I ordered a gallon out from Spurlock

Neal with my regular morning order. Well, the trade was just not satisfied with it. They kicked on it. I knew they were not used to it, because I had always served the other, so I did not serve it any more. The other syrup always appeared to be a richer syrup, a heavier bodied syrup and seemed to suit them. That was why I quit handling Atlanta Coca-Cola. I have a sign up at the fountain saying I handle Fletcher's Cola. I have had it up there for a long time. I know this, the trade is satisfied with it. I have been serving them for years and they do not know anything else except what I have been serving them. I have a line of trade that I have been doing business with for years, ever since I have been there. * * * *I had the Atlanta Coca-Cola complained of as not what was asked for when it was served to a man in response to a request for coke or dope.*" (Rec., 1110-1111).

GEORGE R. EDMONDSON, retail druggist, Atlanta, Georgia:

"If a man comes into the store and asks for a 'dope', I think he wants a cola." (Rec., 1300).

J. L. DRAKE, head dispenser at Nunally's, Birmingham, Ala.:

"I have been a soda dispenser for about ten years. I have dispensed 'Coca-Cola'. That is the only one. I have heard of several other cola drinks on the market, quite a few. Some of them are 'Rye-Ola', 'Gay-Ola', 'Chero-Cola'. If I had 'Coca-Cola' in the fountain and 'Rye-Ola' in the fountain together, not in the same container, but in the same fountain, and a customer should come in and ask for a 'dope', I would give him the one I made the most money out of, if he asked for a 'dope'. * * * If he asked for a 'dope' and I served him with 'Rye-Ola', I would consider I gave him what he asked for. * * * I do not consider 'dope' specifies any par-

ticular drink. I have never termed it that way. * * * I handle root beer at our fountain. It is made by the John Hungerford Smith Co. I have never dispensed any 'Hires' root beer. I was in stores where it was dispensed. 'Hires' root beer is extensively advertised. If they specify '*Hires*' root beer, we have not got it, but if they just ask for *root beer*, if they do not specify *Hires*', we give what we serve. If I had two root beers, this root beer I now have and '*Hires*' root beer, and a customer came in and said, give me a *root beer*, I would give him the cheaper article. I would consider I had given him what he asked for." (Rec., 1402-4).

R. A. THORN, retail druggist, Meridian, Miss.:

"I dispense all of the different drinks, lemon, orange, vanilla, 'Coca-Cola', 'Dope, and 'Koke' syrups. I get this 'Dope' syrup and this 'Koke' syrup from the Southern Koke Co., New Orleans. Other cola drinks I have handled are 'Ko-Nut', 'Coca-Cola' and 'Afri-Cola'. Rec., 1420). * * * When customers come in and ask for 'dope', I do not consider that they are making a definite and specific request on me to serve them with 'Coca-Cola' exclusively. When I was handling 'Coca-Cola' exclusively, and they asked for 'dope', I served them with 'Coca-Cola', because that was the only cola syrup I handled at that time. If I had had any other cola syrup at that time, and they asked for a 'dope', I would have served them the first cola syrup that was in reach of me, I guess, the one most convenient. What I have just said applies to 'coke' just as well as it does to 'dope'. *At that time it was the only cola syrup known and the only cola syrup supposed to contain any drug or 'dope', and I therefore thought they were specific requests for 'Coca-Cola'.* That was before I heard of the others; before any other cola syrup was on the market around here, so far as I know." (Rec., 1425-6).

H. F. CRISLER, a retail druggist, Jackson, Miss.:

"I handle 'Coca-Cola' and 'Dope'. I get this 'Dope' from New Orleans, the Southern Koke Co. I handled 'Ko-Nut'. Customers come in and ask for a 'Coca-Cola' if they want the genuine 'Coca-Cola'; if they want some other cola drink, they ask for a 'coke' or a 'dope'. I know I am giving them what they want, because that satisfies them, and if I serve them 'Coca-Cola' it does not satisfy them. I have had customers come in and ask for a 'dope' and I served them with 'Coca-Cola', and they would say it did not satisfy them, or reject it. It has occurred quite often, when we would be out of the 'Dope' syrup and have to use 'Coca-Cola', quite often we would have complaints on the syrups on the drink they were getting, almost invariably from the regular customers." (Rec., 1426-7).

H. M. TODD, a retail druggist, Jackson, Miss.:

"We dispense just one cola drink, 'Ko-Nut', out of Atlanta. The fellow I bought out used it and I continued using it. Mr. Clark, who was traveling for them, quit the 'Ko-Nut' people, and started in business for himself and went to manufacturing a 'dope' of his own, 'Miss-Ola', I believe. I used one barrel of it, which did not give us satisfaction, and we quit, and we started using a preparation put up by the Southern Koke Co., called 'Koke'. *Our customers, in asking for these cola drinks, ask for 'dope' and 'coke'.* I give them 'Dope', all we have got. I mean by 'Dope', this New Orleans product of the Southern Koke Co. Before I began to handle that, when they asked for 'dope' or 'coke', I gave them 'Ko-Nut'. When our customers asked for 'dope' or 'coke', and I served them either 'Dope' or 'Koke' made by the Southern Koke Co., of New Orleans, in a way I considered I was giving them what they asked for, something on the same order as dope. We never had any customers turn it down

or reject it, when served them in response to calls for 'dope' or 'coke', on the ground that it was not what they asked for. We have had them to send back 'Coca-Cola' and ask for 'Dope'." (Rec., 1438).

ROBERT E. OUSLEY, a retail druggist, Kosciusko, Miss.:

"We are dispensing 'Coca-Cola', and we have one called 'Koke' and 'Dope'. 'Koke' and 'Dope' is shipped from New Orleans, from the Southern Koke Company, Limited. I have dispended 'Ko-Nut' syrup, it is a cola drink. (Rec., 1442). * * * When customers come into my place of business and ask for a 'dope' or a 'coke', I do not consider they are making a definite and specific demand on me for 'Coca-Cola' exclusively." (Rec., 1449).

HUGH LEE BOYD, a retail druggist, Kosciusko, Miss.:

"I am dispensing the Southern Koke Company's 'Koke' or 'Dope', and 'Coca-Cola'. I have dispensed this Hagan & Dodd drink, 'Ko-Nut'. Customers indicate to me that they want a cola drink by asking for a 'coke', 'dope', 'give me a shot', and things like that. When customers come in and ask for a 'coke', 'dope', or a 'shot-in-the-arm', or 'shot', I do not understand or consider that they are making a definite and specific request on me for 'Coca-Cola' and nothing else. (Rec., 1450-51). * * * 'Dope' and coke', 'cola', and 'shot-in-the-arm', mean any cola drink. I have been hearing it ever since I have been big enough to hear. I always had my mind made up that way. I think they are nicknames for any cola. I think they could be nicknames for 'Coca-Cola' as well as nicknames for 'Gay-Ola' or 'Dope'. I never thought they applied exclusively to 'Coca-Cola'. (Rec., 1453). * * * The public at large mean by 'coke' and 'dope' *any cola* drink, because *they come under that head.*" (Rec., 1454).

C. J. THORNTON, a retail druggist, Hattiesburg, Miss.:

"I dispensed at my soda fountain a general line of all flavors, and I sold 'Afri-Cola', 'Coca-Cola', 'Dope', 'Ko-Nut', 'Luck-Ola'. I never sold any 'Gay-Ola'. When customers came into my soda fountain and wanted a cola drink, I kept track once, and 90 per cent. would call 'dope'. When they called for 'dope', I gave them anything I had in the line of 'Ko-Nut' and 'Gay-Ola', I mean 'Afri-Cola', 'Koke' or 'Dope', any cola drink. When my customers came in and asked for 'dope' and I served them 'Ko-Nut' or 'Luck-Ola', I considered I was giving them what they asked for. I never had any customers refuse any drink served, when asked for 'dope', on the ground it was not what he asked for. (Rec., 1759). * * * When customers come in and ask for a 'dope', I do not consider they are making a definite and specific request on me for 'Coca-Cola' exclusively. *Take 'Dr. Pepper's', that is the first I ever heard called 'dope'*, and, oh, that has been about five years ago, I was in Shreveport, I heard it called 'dope'. * * * The word 'dope', as applied to a soda fountain beverage, means any cola drink." (Rec., 1760).

J. E. JONES, a retail druggist, Hattiesburg, Miss.:

"I have dispensed 'Coca-Cola', made by the Coca-Cola Co., and 'Ko-Nut', by Hagan & Dodd and made in Atlanta. When customers came in and asked for these cola products, the average run of customers ask for 'dope' or 'coke', 'dope', usually. I served 'Ko-Nut' when I handled it. * * * When customers came in and asked for a 'dope' and I served them with a 'Ko-Nut', I considered that I gave them what they asked for at that time. * * * I cannot remember that we ever had a customer to refuse 'Ko-Nut' when served to him on requests for 'dope' or 'coke.'

(Rec., 1796-7). * * * I have never considered, when a customer came in and asked for a Dope or a Koke' that he was making a definite and specific request on me for 'Coca-Cola' exclusively." (Rec., 1801).

E. J. WILLIAMS, a retail druggist, Hattiesburg, Miss.:

"We dispense 'Dope', 'Koke', 'Ko-Nut' and 'Coca-Cola'. This 'Koke' and 'Dope' are from the Southern Koke Co. When customers come in and ask for 'Koke' or 'Dope', we give them 'Koke' or 'Dope'. If a customer comes into our drug store and asks me for either a 'Koke' or a 'Dope', I do not consider that he has made a definite and specific demand on me for 'Coca-Cola' exclusively. When he asks for a 'Koke' or a 'Dope', and I serve him this New Orleans product, I think I give him what he asked for. I have never had a customer reject the New Orleans product, 'Koke' or 'Dope', when he asked for it as 'Koke' or 'Dope', on the ground it was not what he asked for." (Rec., 1807-8).

W. A. HICKMAN, a retail druggist, Monticello, Miss.:

"We dispensed 'Coca-Cola', 'Dope' and 'Koke'. * * * When customers come in and want a cola drink, they use different names, 'Koke', 'Dope', and 'Coca-Cola'. * * * The word 'Dope' means, as applied to a soda fountain beverage, why, I do not know, I do not guess it means any particular brand. (Rec., 1821). * * * When a customer calls for a 'Koke' or a 'Dope', they want any cola drink. * * * *A lot of people call for 'coke' and 'dope' and do not know what they want. I have asked several. Asked what kind of drink you want. They say, I don't know, anything, what kind of cola do you sell here?* (Rec., 1823). * * * I do not know whether a man wants Coca-Cola or not when he calls for 'Dope' or 'Koke'. * * * and the reason [why] is I do not know

what they want when they ask for 'dope' or 'coke' [is that] they do not designate any specific drink." (Rec., 1826-27).

A. S. GOODY, a retail druggist, and mayor of Lucedale, Miss.:

"I dispense 'Dope' and 'Coca-Cola'. This 'Dope' is bought from New Orleans, the product of the Southern Koke Company, Limited. I consider the word 'dope' means anything in that line, of 'Coca-Cola' or cola beverages, like 'Ko-Nut', 'Afri-Cola', 'Gay-Ola', any of those cola drinks, rather an indefinite term. It does not mean any specific one, no specific brand of cola drinks." (Rec., 1786).

BURTON JONES, retail druggist, St. Elmo, (a suburb of Chattanooga), Tenn.:

"I have had calls for 'dope' at my establishment. When a customer asks for a 'dope' he wants a cola drink of some kind. * * * When customers come to my store and ask for ' a dope' we serve 'Coca-Cola.' * * * At the time we had 'Tru-Cola', we usually gave 'Tru-Cola'. They were satisfied with it, anyway I gave them the 'dope'. None of them ever refused 'Tru-Cola' on the ground that it was not what they asked for. (Rec., 1006). * * * Up to the time I started handling 'Tru-Cola', three years before January 8, 1914, I only handled 'Coca-Cola' and nothing else of that kind. Northern people would come in there and say, 'Give me a dope' ,and, naturally, we give them a cola drink, but they say that is not what they want. * * * We have a great many tourists that call ice-cream soda 'dope', that is what they call it. Up to the time we put in 'Tru-Cola', we served 'Coca-Cola' for 'coke' or 'dope'. * * * I served them [the] only 'coke' or 'dope' I had, prior to the time I put in 'Tru Cola', and then, when I got two kinds, I served first one and then the other. If

I had had any other cola drink on hand besides 'Coca-Cola' before I began handling 'Tru-Cola', I suppose we would have done the same as I did do when I handled both. * * * I handle cigars, also, and have customers come in and say, 'Give me a *cigar*.' If he does not point out some *particular brand* he wants, I usually give him a bunch of cigars made here in Chattanooga that costs us $31.00 or $32.00." (Rec., 1012-13).

C. H. JOUETT, a drug clerk at the Live & Let Live Drug Store, formerly at Miller Pharmacy, Chattanooga, Tenn.:

"I have served 'Coca-Cola' in response to requests for 'dope'. * * * As a matter of convenience, when I have 'Ala-Cola', 'Ko-Nut' and 'Coca-Cola' in the jars, I serve either one I feel disposed to. *It is like going into a bar room and asking for a glass of beer;* if I do not *specifically* ask for *'Hauck's'* or *Budweiser'*, I get a glass of *beer*. * * * If I go into a fountain and ask for *a shot'* I do not care what he gives me, so long as it is a *cola* drink. If a customer comes to my store and asks for 'a shot', he gets 'Ko-Nut' or 'Ala-Cola', any cola drink. That has been so at nearly all the places I have been with at fountains. At each fountain where I have been, when they asked for 'dope', I just gave them any of them, it did not make any difference."(Rec., 1054-5).

DR. H. O. NULL, a practicing physician and also proprietor of a soda fountain, Highland Park (a suburb of Chattanooga), Tenn.:

"We handle cola drinks. The only cola drink we have now is 'Coca-Cola', and 'Ko-Nut'. I have handled a number in my time. I have handled Wise-Ola and Luck-Ola at one time, and 'My-Ola'. I have handled 'Coca-Cola' during the time I have had

the soda fountain. We have always handled some other cola drink. (Rec., 1063). * * * My customers use a good many different names; now, I do not know whether it is particularly these cola drinks or not, but they come in and call for 'dope', and 'coke', and 'shot', and 'Give me a dose of lead,' and everything else. When they use these names I believe it is generally known that they want a cola drink. When a man comes into my soda fountain, a customer, and asks for a 'dope' or a 'coke', I do not understand that he has made a definite and specific request for 'Coca-Cola' exclusively. He has not asked for 'Coca-Cola'. When customers come in and ask for 'dope', 'coke', or 'shot-in-the-arm', I serve what we have; if we have 'Coca-Cola', if we have 'Ko-Nut', we give them either one of them. * * * I regard the names 'coke' and 'dope' as nicknames for cola beverages as a class. * * * That has always been my diagnosis of that class of drinks. I have never had any of my customers refuse any of my cola drinks that I have served in response to requests for 'coke' or 'dope', 'shot', or 'lead', or anything of that sort, on the ground that it was not what they asked for." (Rec., 1064-5).

J. M. WHEELER, bar tender, Chattanooga, Tenn. (Rec., 970-2):

"I handle * * * 'Coca-Cola', 'Maud Muller', 'Koke', 'Rye-Ola', and 'Tru-Cola'. * * * I have had customers come into my place and ask for a 'dope', and, when they do, I give them some kind of cola drink. I serve them the first thing that is handy when they ask for a 'dope', any kind of cola drink. I have served 'Rye-Ola' and 'Tru-Cola' when they ask for a 'dope'. When customers ask for a dope, I take it for granted they want some kind of cola drink, they do not want any particular kind. I do not regard a request from a customer for a 'dope' as a specific request for Coca-Cola' exclusively. When customers come in and ask for a dope, I take it for

granted that any kind of a cola drink will suit them. * * * I have never had any of these cola drinks, other than 'Coca-Cola', refused on the ground that it was not what they asked for, when a customer asked for a 'dope' and I served this other drink in response to that request. I am about my stand most all of the time so I can hear the requests my customers make for drinksthat way; *the customers ask for these cola drinks in just any kind of a name.* What have you got, what kind of soft drink have you? Sometimes I will call over what I have for them and they will say, *Any of them will do,* it doesn't make any difference to them. I serve near-beer to customers by nicknames, too. Some of the nicknames they ask for it by are; a glass of foam, slop, suds, and so on. I do not regard that as a specific request for some particular brand of near-beer. They just want something out of the keg. I regard those names as general nicknames and applicable to that class of drink. 'Dope' is pretty much the same way,—they just want something of that *kind* of drink; they don't mean any one drink when they come in and call for 'dope'." (Rec., 970-971-972).

E. W. FREEMAN, bar tender for thirteen years, Chattanooga, Tenn.:

"During all this time in Chattanooga, I have handled cola drinks. Some of the drinks are 'Coca-Cola', 'Rye-Ola', 'Ala.-Cola', 'Maud Muller'. * * * I have been about the bar so I could hear the words customers used in asking for the different drinks they wanted. I am a bar tender, and have known of cola drinks, other than 'Coca-Cola', possibly eight years, and perhaps longer. I have been handling other cola drinks since I have been in the saloon business, the greater portion of the time. * * * When customers come into my store and ask for a 'dope', I give them most any dark colored bottled drink, 'Koke', or that 'Ala-Cola', it used to come

handy, and I used to give a good deal of that 'Maud Muller', I give all of these. (Rec., 973-974). * * * I understand, when a customer asks for a 'dope', that most anything you give him out of a dark bottle suits him just as well as if he had called for any particular name, a drink of that class, a cola drink, a drink of that same general taste, color, exhilarating effect, and so forth. I take 'dope' in general as a name for all of those colored drinks. * * * *I have heard only 'coke' and 'dope' applied to these cola drinks.* I have heard of these names, 'coke' and 'dope', a fair estimate, of about eight years. * * * I served beer at my establishment, and the names they ask for it by besides beer, are: 'German courage', 'suds', and such as that, something like that. I do not regard requests for beer under those names as requests for any specific brand of beer. (Rec., 974-975). * * * If a man came into my place of business and asked for a 'coke', I would give him almost anything, the first thing I got my hands on, if I was very busy. *Sometimes I asked him if he wanted 'Coca-Cola'. He would say, 'Give me some dope, I don't care.'* " (Rec., 977).

R. F. ZIMMERMAN, proprietor of the Union Bottling Works, Chattanooga, Tenn.:

"When I first went into business I bottled a cola drink that I made myself, practically five years ago; I didn't have any special name; the wagon men called it 'dope', generally, in selling it to the trade, they would halloa, *'Give me a case of dope.'* We didn't have any name on it, just a plain crown and no label whatever, in a black bottle, and called it 'Dope'. We would throw it out if they called for 'coke'; we gave them the same thing, 'coke' or 'dope'. (Rec., 978-979). * * * There is another one in town, 'L'Aroma', that is a dope drink. (Rec., 981). * * * When I first come South was the first time I ever heard or knew of any 'coke' drinks whatever in any way." (Rec., 984).

A. F. ENSINGER, bar tender at Eagles Club, Chattanooga, Tenn.:

"I am about the bar so I can hear the names people use in asking for drinks they want. I dispense cola drinks. Some of the cola drinks I have dispensed are: 'Coca-Cola', 'Koke', 'Ala-Cola', Tru-Cola', 'Ozeola', 'Maud Muller'. * * * I have known of other cola drinks on the market for fourteen years past. * * * I have calls at my place of business under the name 'dope'. I generally give them a cola drink of that sort, whatever I have to give them. I do not know as they have made a specific request on me for 'Coca-Cola' and nothing else. I never had any customers reject any cola drink served to him in response to a request for a dope', other than 'Coca-Cola', on the ground that it was not what he asked for. I am still handling 'Coca-Cola'. I regard 'dope' as a name for that class of drink, and not a specific name for 'Coca-Cola'. I also dispense beer. There are numerous nicknames for it, such as 'suds', 'Dutch disturbance', and various other names. When a man comes in and asks for 'suds', or 'Dutch disturbance', I do not understand that he is asking for any specific brand of beer. * * * I have heard the word 'dope' used long before I went into the bar tending business, when I was still a baker. I understood the word 'dope' to mean, as applied to soft drinks, that they wanted a drink of that *kind*, a *cola* drink." Rec., 984-985-986.)

TOM COLLINS, bar tender, Chattanooga, Tenn.:

"Some soft drinks we have are white soda water, 'Koke', 'Coca-Cola', 'Poinsetta'; I think that is about all. I know of 'Ala-Cola' and this 'Maud Muller', but we do not handle them any more. I have known of soft cola drinks on the market five or six years. (Rec., 988). * * * Customers come in and ask for 'dope'. Of course *they call all of them 'dope'*, some of them do. * * * When a cus-

tomer comes in and [asks for a dope], I do not understand that he has made a specific and definite request for 'Coca-Cola' only. Lots of times they come in and say, give them a 'dope'. I ask them what kind. * * * In dispensing, when I have had customers ask for a 'dope', and have dispensed to them a cola beverage other than 'Coca-Cola', I have never had that beverage rejected on the ground it was not what they asked for. (Rec., 989). * * * When a man comes in I ask him what *kind of 'dope'* he wants. Sometimes he says 'Koke', and other times 'Coca-Cola'. We handled that 'Ala-Cola' and 'Maud Muller', they called 'Ala-Cola' 'dope', too. I never had 'Ala-Cola' rejected by any of my customers, when asked for by the name of 'dope', on the ground it was not what they asked for." (Rec., 990.)

JOE QUINN, bar tender, Chattanooga, Tenn.:

"We handle 'Koke', White Soda, 'Poinsetta, and 'Sinalco', and this 'Panpepsin', we have that, too. We get 'Koke' from the Chattanooga Bottling Co. 'Ala-Cola', we handled that. Other cola drinks I handled besides that were 'Star-Cola', 'My-Cola', and the stuff made by Mayfield, and had some made by Gerst,—I forgot the name of it. I have known of 'Tru-Cola', and other cola products on the market similar to 'Coca-Cola', for ten or twelve years. (Rec., 991). * * * All of them cola dopes, one is the same as another. (Rec., 992). * * * *It was well known that we did not handle 'Coca-Cola', and still they asked for 'dope' and 'coke'.* * * * I have heard the name 'dope', as applied to soft drinks, for seven or eight or ten years, as long as I have been working around the business. In Nashville, when they asked for 'dope', I gave them what we had in the house, * * * if I had 'Gay-Ola', I gave them that. When a customer comes in and asks for a 'dope', I understand that he has made a request for what I have *in that line;* I do not regard the word 'dope'

as a specific and definite nickname for 'Coca-Cola', no more than one of the others. I understand when customers ask for a 'dope', they want anything we have got *in that line*. All of it is dope to me, I do not know one from the other. I do not know, I guess they call that 'Koke' 'dope', I guess they call 'Coca-Cola' 'dope', and they call 'Ala-Cola'—whatever we have got *in that line, they call all of it 'dope'*. Recently trade has been very strong for 'Koke'. Rec. 993-4). * * * *Lemon soda* is *not* known as a *'dope'*. *Sarsaparilla* is *not* known as a *dope.' Root beer* is known as *root beer*. *'Panpepsin'* is *not* known as *'dope'*, neither is *'Poinsetta'* or *Sinalco.* (Rec., 995). * * * When I handled 'Coca-Cola' by itself, and a man asked for a 'Dope', I gave him 'Coca-Cola', that was the only thing I had." (Rec., 996).

F. E. HOOPER, a retail grocer, Chattanooga, Tenn.:

"I have handled cola drinks. I have handled 'Coca-Cola', I have handled 'Koke', I handle 'Koke' now, 'Digestol', and most all; I buy from all the wagons that go around town. (Rec., 997). * * * I have had people come into my store and ask for 'dope'. When they ask for 'dope', I say 'What kind of dope?' I do not understand they are asking for any particular brand of drink when asking for a 'dope'. I do not regard that name as a specific and definite name for 'Coca-Cola'. (Rec., 998). * * * 'Coca-Cola' is the *oldest* 'dope' or 'coke' I remember." (Rec., 999).

M. J. COSTELLO, bar tender, Chattanooga, Tenn.:

"I have been handling soft drinks for ten years. * * * I have handled White Soda, 'Digestol', 'Sinalco', 'Ginger Ale', 'Ala-Cola', 'Tru-Cola', 'Koke', 'Rye-Ola'. * * * I have had customers come into my establishment and ask for 'dope' quite frequently. The last place I worked at did not handle any

thing else but 'Koke' and 'Tru-Cola'. * * * I give the first thing I get my hands on. It don't make any difference. What the customer wanted when he asked for 'Dope' was a soft drink, some kind of *coke*', unless they specify what they want, I give them the first I come to. You see the profits are about the same, and I just grab the first one I get my hands on. When a man comes into my establishment and asks for a 'dope', I do not understand that he is making a specific and definite request for 'Coca-Cola'. I think if he wanted 'Coca-Cola' and nothing else, he would call for 'Coca-Cola'. Other names customers use in asking for cola drinks are, Give me a 'coke', a 'dope', a 'shot', or something like that. (Rec., 1000-1001). * * * If they say, 'give me a shot,' I would give them 'Tru-Cola' or 'Koke'. If I had 'Coca-Cola' I would give them that, or whatever I got my hands on. * * * When I went to a soda fountain and asked for a 'dope', I expected to get what he had *in that line*, whatever it was. No particular brand. I regard 'coke' and 'dope' [as] nicknames for cola drinks as a class. (Rec., 1001). * * * 'Coke' and 'dope' [are] both applied to any kind of *cola* drink." (Rec., 1003).

A. W. STANLEY, proprietor of Hotel and Bar, Chattanooga, Tenn.:

"I have had customers come into my establishment and ask for a dope. I asked what kind of dope they wanted, some would say Coca-Cola, and some would say 'Give me some of that new drink of Rief's, that Maud Muller,' and such things like that, you know. If he would say a dope, of course, before Koke or any other drink was introduced, come in, and we only had Coca-Cola, I would understand that he wanted Coca-Cola. Lots of fellows would come in and say 'Give me a dope.' I would say, 'What kind of dope do you want?' and he would say, 'Give me Coca-Cola,' or 'give me something else.' You know sometimes they call Coca-Cola

dope you know how these fellows are. Customers ask for cola drinks by saying, 'Give me a shot of cocaine.'" Rec., 1005).

R. L. WAYMAN, bar tender, Chattanooga, Tenn.:

"I handle soft drinks in connection with my business, some of them being, 'Tru-Cola', White Soda, Red Soda, 'Maud Muller', 'Poinsetta', 'Sinalco', 'Koke',—they call it 'Dope'. Other cola drinks I have known are 'Ala-Cola'. I have known of these other cola drinks ever since I have been in business. * * * I have customers come in and ask for 'dope'. I give them, when they ask for 'dope', 'Dope', 'Koke', 'Tru-Cola', 'Ala-Cola', something like that. * * * They would ask for 'Coca-Cola' if they wanted it. * * * If a customer comes into my establishment and asks me for a 'dope', I do not consider that he has made a definite and specific request on me for 'Coca-Cola' and nothing else, they call all these soft drinks 'dope'. I never had any customers to refuse any other cola drinks, on the ground that it was not what he asked for, when he asked for a 'dope' or a 'coke' and some other drink besides 'Coca-Cola' was served, that I can recall. He can tell whether or not he is getting that or 'Coca-Cola'. The 'Coca-Cola' bottles here all have *the name on them, blown in the glass*, and the other bottles have not. * * * I have had customers who came in and asked for 'dope', and knew that they were not getting 'Coca-Cola', and who seemed to be satisfied with what they got. (Rec., 1014-15). * * * I am not positive whether it was here or in some other city, but I do remember seeing the crowns with 'D-o-p-e' on them. I have sold other drinks when that was called for. 'Tru-Cola', 'Ala-Cola', and 'Koke', that is what I call 'dope'. (Rec., 1017). * * * When I was handling 'Coca-Cola' alone, I would give that in response to calls for 'cola' or a 'dope'. * * * 'Coca-Cola' is a 'dope' like all the rest of the soft drinks. 'Dope' applies to all soft drinks, all *'dope' stuff*. Most invariably when a man

calls for 'dope', I ask what *kind* of 'dope' he wants." Rec., 1018).

W. F. STRICKLAND, bar tender, Chattanooga, Tenn.:

"We handled 'Koke', 'Maud Muller', that is a 'dope', and we used to handle Zimmerman's stuff, 'Dope'. I believe it was; also handled 'Coca-Cola'. * * * When customers ask for 'dope,' I give them the first thing I get hold of in a soft drink box. 'Maud Muller', 'Dope', or 'Koke', anyone, I give the first one I get hold of, it does not make any difference. * * * If a man asks for a 'Dope' or 'Koke', I give him either one I get hold of. * * * When a customer comes in and asks for a 'dope', I take it for granted that he wants 'Dope' and does not care what it is, just so it is something cold. * * * If he says to me give him a 'dope' * * * I give him whatever I get hold of first. * * * The 'Coca-Cola' bottle has '*Coca-Cola Bottling Company*' on it. I believe it has on the bottom, *Trade-Mark registered*, or something like that, great big '*Coca*', and another big 'C', and the rest of the letters small. If they ask for the bottle I will show them. Some people want it out of the bottle. They will take it up and look at it, some people do, and want 'Dope', and some people call for 'Maud Muller', and some say give me a 'Koke'." (Rec., 1048-9).

LUKE POGUE, bar tender, Chattanooga, Tenn.:

"I have dispensed a general line of soda water, red and white, ginger-ale, 'Digestol', 'Coca-Cola', 'Rye-Ola', 'Gay-Ola', 'Ala-Cola', 'Nerve-Ola', 'Koke' and 'Gay-Nol'. Most all '*coke*' drinks have the same color. * * * I have known of these other drinks on the market similar to Coca-Cola about ten years. Customers in asking for the different cola drinks ask for a 'dope', or a 'shot', or a 'sniff', or different things. When they ask for those things I give them

most any kind of a *'coke'* drink we have on hand, I mean by *'coke'* drink any that is put up in a black bottle, 'Koke', 'Gay-Ola', 'Nerve-Ola', 'Coca-Cola', these cola drinks. I have customers come in and ask for 'coke'; I serve them just whatever we have on hand, if they do not specify. If they call for 'Koke', whichever way you spell it, we give it to them; if we don't have it we sell them what we have. The same applies to 'dope'. In dispensing these drinks, we just set up a glass and a bottle to them so they can see the bottle. The name 'Coca-Cola' is on the 'Coca-Cola' bottle. Some of the others have names on the bottle and some don't. There is no way for our customers to know, when they come and ask for 'dope', the drink they are getting without it is 'Coca-Cola'; 'Coca-Cola' uses their own bottles and these *other coke companies*, most of them use bottles they pick up, almost all of them, and you may get a case with a dozen different names on the bottles. The 'Coca-Cola' bottles have *'Coca-Cola'* on them. * * * When a customer comes into our establishment and asks for a 'coke', I do not understand that he has made a definite and specific request on me for 'Coca-Cola' and nothing else." (Rec., 1060-61).

J. C. McDONALD, bar tender, Chattanooga, Tenn.:

"I handle soft drinks in my business. I have 'Coca-Cola', 'Sinalco', 'Poinsetta'. I did handle 'Coca-Cola', but not since I have been in business for myself, that has been six or eight weeks. I have got 'Koke' since I have been in business here, when in business with other people we had 'Coca-Cola' for a while. We had 'Ala-Cola', 'Maud Muller', 'Tru Cola'. (Rec., 1067-8).***I have customers come into our place of business and ask for 'dope'. When they ask for 'dope' I give them anything I have got in the line of a cola drink. I understand when they call for a 'dope', no particular brand, unless they

call for the particular brand. I never had a customer refuse any of the other cola drinks we have dispensed, other than 'Coca-Cola', when he asked for it as a 'dope', on the ground that it was not what he asked for. *** Customers do not come and ask for a cola drink by any other name besides those I have mentioned, they say 'coke', 'dope', sometimes 'shot', something like that. I understand they want *anything* in the *cola line*, and I give them what I have got. I do not consider the name 'coke', or the name 'dope', is a specific and definite name for 'Coca-Cola', and no other drink." (Rec., 1068-9).

W. M. POLLOCK, Bottler, Nashville, Tenn.:

"We bottle 'John D. Fletcher's Koka and Cola' flavors. That is the only cola drink we bottle. The name of our concern is the Nashville Bottlling Works.***I have bottled other cola drinks. We bottled the 'Coca-Nola', 'Rye-Ola', 'Gay-Ola', 'Mi-Ola', 'Star-Cola', and bottled other drinks, and I have had several samples of different drinks bottled at different places. I have heard of, I guess, about 40 or 50, something like that, different cola drinks. (Rec., 1198-9).***I have heard 'coke' and 'dope' well mighty near ever since I can remember a cola drink. I have heard 'coke' called more than I have 'dope'. These words, as applied to a soft drink, I think they mean a cola drink. That is what I mean when I call for them. I go into a soda fountain and ask for a 'coke' or a 'dope' mighty near every day; I expect to get a cola drink. I do not expect *any particular* cola drink, because it don't make no difference just so I get a cola drink, a *caffeine* drink. When I go in and ask for a 'coke' or a 'dope', I do not consider that I am making a definite and specific request upon the soda dispenser for 'Coca-Cola' and nothing else. Just so he gives me a cola drink to quench my thirst is all I care about. I am not particular about what he gives me. *The people in ordering call for 'cola', and sometimes they use*

'coke'. We have had written orders call it 'C-o-k-e ***I have one at the house, I do not know, the secretary may have some more in his safe; I expect he has.***I do *not* regard 'coke' and 'dope' as meaning *any certain one.* (Rec., 1201-2).

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola", Atlanta:

"Engaged in manufacturing syrups and soda water for about 27 years. I am now manufacturing just a general line, ginger ale, root beer, 'Lemo-Lime', 'Ko-Nut', 'Afri-Cola'.***I have known of cola drinks, these caffeine drinks, not counting Coca-Cola, for about 16 years. I got into the 'Afri-Cola' 16 years ago.***I have heard the words 'coke' and 'dope'. The first time I heard such expressions was when I first became connected with the 'Afri-Cola' business. I heard that expression through our traveling man, Mr. Harris. *We received an order from a customer of ours in Memphis, I believe it was, to ship a keg of 'dope'.* I did not know what it was. I asked Mr. *Ferris* (Harris) about it, and he said that was a name they called the cola drinks in Memphis. *** I had never heard the word 'dope' applied to soda fountain beverages before that time. There was a concern here in Atlanta once that used to put out a product under the name of 'Dope', the name of that concern was Dope Company'. I think they labeled their bottles 'Dope', they advertised their product in Atlanta; I do not remember how extensively. It was a caffeine drink, one of these cola drinks. It was similar in color and taste to 'Coca-Cola'. This concern in Atlanta put out these goods under the name of 'Dope' 12 years ago, to the best of my recollection. (Rec., 1291-4).***I knew of the words 'coke' and 'dope' as applying to this class of beverages long before I ever heard of them [defendants' products]. ***The first time I heard that word 'dope' was

in 1899.***I *conceive* [concede] that the 'Coca-Cola' was the original *'cola'* drink, *'coke'* drink, or *'dope'* drink, and their advertisements called attention to it." (Rec., 1298).

C. N. BAKER, a bottler for 16 years, at Newman, Georgia:

"I have bottled 'Cola-Queen', I called it, and 'Mi-Cola', and 'Coca-Nola', 'Rye-Ola', and I don't know how many, every drummer that come along I had to take at least a trial package.***The names the purchasers who want to buy a bottle of this stuff use in asking for it, some will call for a 'cola', some for a 'dope'. I have sold many a one for 'dope'. I reckon I have sold a fourth of what I put up for 'dope'. (Rec., 1407).***If you come in and ask for a 'dope', it don't make any difference what you have, you give it to him, I do, always did. I never had any one reject what I gave him on the ground it was not what he asked for." (Rec., 1408).

R. W. LOCHRIE, a bar tender, Birmingham, Ala.:

"I tend bar at the Woodward.***I dispense soft drinks there, and cola drinks, also. We are handling at present 'Nifti-Cola'. Before we began handling 'Nifti-Cola', we handled 'Cola-Nip' and 'Coca-Cola'. There is a label on this 'Nifti-Cola' bottle.***I think it is blown in the bottle, and there is a label on there,—a diamond shaped label, 'Nifti-Cola'. It is a little yellow diamond shaped label on the side of the bottle.***Some customers call for 'a cola', what they want, others call for 'a dope'; they come in and say, give me a bottle of dope. When they come in and say, give me a bottle of dope, I give them what I handle, I give them 'Nifti-Cola'. If a man ordered a bottle of 'dope', I would give him anything I had *that come under that head* in *that line of drink.* When I was handling 'Coca-Cola' and 'Cola-Nip', when a customer came in and

asked for a 'dope', I gave him the first one I got hold of, unless he specified a certain one. When a customer comes in and asks for a 'dope', I do not consider that he has made a definite and specific demand on me for 'Coca-Cola'. I would take the word 'dope' myself to mean a drink that would come under the head of *cola* drinks, soft drinks in *that line*, 'Coca-Cola', 'Nifti-Cola', 'Cola-Nip', 'Chero-Cola', anything, that is my own idea on that. I have known of these cola drinks ten years, maybe longer, I guess longer than that.***I have never had a customer reject any of the cola drinks I have dispensed when he asked for a 'dope' on the ground that it was not what he asked for, but I have when he asked for certain drinks and I told him the difference. I have had them come in and ask for certain drinks and told them that I did not have that drink, but tell them the drink I have and I have had them refuse to take that one. When I set a bottle of 'Nifti-Cola' up on the counter for a customer he ought to be able to tell that it is not 'Coca-Cola'. I could tell *by the label.*" (Rec., 1339-1340).

H. O. Adams, retail grocery business, Adamsville, Ala.:

"I know J. C. Mayfield. I knowed him in 1903. ***I was engaged in the retail business at Littleton, Alabama, selling groceries, fruits, meats and drinks. I bought some of Mr. Mayfield's products. I bought 'Celery-Cola' and the drink—the 'Koke'. ***That was bottled goods I got. (Rec. 1343). ***I am still in business. I have handled different products, something like those, 'Wise-Ola' and drinks made out here by the Pioneer Bottling Works, the same kind of stuff. They don't make nothing but 'Coca-Lulu'. *** That was when I was at Littleton, I sold that stuff. *** We used to handle 'Rye-Ola', 'Wise-Ola', and some other kinds of drinks and after that I went into the bottling business in 1907, to bottling. I was bottling

up to the first of January. I shut down. There was no money in it then. We bottled what you call 'Queen-Ola' and 'Wise-Ola'. *** 'Dope' applies to all these kinds of drinks." (Rec., 1344-5).

H. L. FISHER, wholesale liquor business, Birmingham, Ala.:

"My business takes me around the bars. *** I frequently hear the names people use in asking for drinks around the bar. *** The bars handle all these drinks sold here in the market, 'Rye-Ola', 'Coca-Cola', 'Ala-Cola', and this 'Dope', and I do not know, there seem to be eight or ten of them. I have known of these cola drinks, it seems to me like, always, but, oh, well, I can't remember when there wasn't any. * * * I have heard people ask for a 'dope' and be served with 'Rye-Ola', or these other drinks. I never heard anybody refuse those drinks as not what he asked for when he asked for it as 'dope'. These 'cola' drinks are all labeled, most of them have the name on the cap. * * * I sometimes go in and ask for those drinks myself. I go in and say, give me a bottle of dope, and I get anything that he gives me, I am not expecting any certain thing. * * * From my experience, my hearing people ask for these different drinks, and what appears from observing the custom of the bars here in Birmingham, I do not consider that when a customer comes in and asks for a 'Dope' that he has made a definite and specific request for 'Coca-Cola', because there is so many of these drinks that a man will go in and ask for a 'dope' and take any one of them that is handed to him." (Rec., 1345-6-7).

G. G. DESOUCHET, bar tender, Metropolitan Hotel Bar, Birmingham, Ala.:

"We handle soda pop and something we call Dope. *** I lived in Louisville about nineteen or

twenty years.***I have never handled in the various places I have worked, any other cola drinks but 'Coca-Cola', and in Louisville, 'Chero-Cola' and 'Coca'. Well, there has been a number of 'Cocoas' with a little difference in the latter part of the name, instead of making it 'Coca-Cola', they make it 'Coca-*something*' you know. I have known that 'Coca-Cola', of course, first, a number of years ago, I do not know just how long, and then these other drinks came out later, and for a number of years I have handled a number of cola drinks. Customers in indicating to me the different cola drinks they want, some of them call for a 'dope' and some of them call for a 'Coca-Cola', or soda pop, but of course, that is nothing like the *cola* drinks. When they come in and ask for a 'dope', I give them 'Dope' Before I commenced to handle 'Dope', when they asked for 'dope' I gave them anything indiscriminately, any of the other drinks I had there. I give them anything. In our business we consider them all 'dope', the whole business. (Rec., 1348-9) *** When a man comes in and asks me for a 'dope' I give him 'Dope', and if he asks me for 'Coca-Cola' I tell him I have not got 'Coca-Cola', but I can give him some 'Dope'. Sometimes he says he don't want it, and sometimes he says, all right, give me that. Customers ask for 'dope', using the word 'dope'. I never have had them reject what I gave them on the ground that it was not what they asked for. At Louisville customers frequently came in and asked for 'dope'. I gave them something besides 'Coca-Cola, some of the other cola drinks. I done that for the reason of price, that is all. Not on account of the goods, that is 'Coca-Cola' costs 70 cents up there, and the other cost 50. If they come in and asked for a 'dope', and I gave them some of the other drinks, I considered I was giving them what they asked for." (Rec., 1350).

S. M. TUCKER, bar tender, Birmingham, Ala.:

"We have the 'Dope', 'Cola-Nip', 'Nifti-Cola', soda waters, but the cola drinks, that would be just the 'Cola-Nip' and 'Nifti-Cola'. *** We use another soft drink, named in the Birmingham business just Dope. Customers indicate these cola drinks by asking for a 'dope', and I give them a 'dope'. Sometimes they will ask for a 'cola' or a 'Coca-Cola', and I tell them I have not got 'Coca-Cola', but I will give you a 'Cola-Nip' or give a 'Nifti-Cola', and they say 'all right'. I always tell them we have not got 'Coca-Cola'. They will say give me a 'Nifti-Cola' or a 'Dope' or a 'Cola-Nip'. When customers come in and ask for a 'dope', I do not consider they are making a definite and specific request on me for 'Coca-Cola'. Some people will not drink 'Coca-Cola'. (Rec., 1353).

OMER REED, bar tender at Morris Hotel Bar, Birmingham, Ala.:

"We handle one cola drink made here in Birmingham, that 'Co?Co', spelled 'coco.' We have been handling that since I have been here. Sam Worcester makes that. 'Dope' is the only name we have for it. They come in and ask for 'dope'. When they ask for dope' I give them that 'Co?Co'. I never had any customers reject that 'Coco' when asked for 'dope' on the ground that it was not what they asked for. There is nothing on the bottle to indicate *****what is in there, only on the crown, 'Co?Co' on the crown. When our customers come in and ask me for a 'dope' I do not consider that they are making a definite and specific demand on me for 'Coca-Cola'. The word 'dope' means to me, as applied to a soft drink, any of those cola beverages, in my opinion. When a man calls for 'Coca-Cola', I would give him 'Coca-Cola' if I had it; I would not give him 'dope'. *We have people come in and ask*

for a 'Coca-Cola'. I tell them I have not got it. They will say, give me a 'dope' (Rec., 1355).

E. D. MONTGOMERY, manager of the Eastern Division of the Southern Bell Telephone Co., Birmingham:

"I go into soda fountains now and ask for drinks of that kind. I sometimes use the word 'dope' in asking for these drinks. When I ask for a 'dope' I don't know what I expect to get. I get anything *in that line of* beverage, 'Chero-Cola', 'Coca-Cola', 'Koke', most any other drink that is put up in that beverage, because they handle so many different grades. ***I do not consider, when I go in and ask for a 'dope', that I am making a definite and specific demand for 'Coca-Cola'. (Rec., 1358).***I happened to be in one of the bars and asked for a 'Coca-Cola', and they said, 'I have not got it, I can give you a dope'. I do not know how long ago that was, approximately, say, two years." (Rec., 1361).

EDWARD J. OPLE, an employee of the Southern Bell Telephone Co., Birmingham:

"Cola drinks on the market are: 'Chero-Cola', 'Coca-Cola', and several different bottled drinks, I am not familiar with the adopted name. I go into a soda fountain and drink those drinks. I usually walk into a soda fountain, or saloon, and ask for a 'dope'. When I ask for a 'dope' I expect to get most any of them. I mean by a dope', several different bottled drinks, not a specific drink, what the substance of it is I can not say. When I go into a soda fountain and ask for a 'dope', I do not consider that I am asking the dispenser specifically and definitely to serve me with 'Coca-Cola'.***If I were served with 'Rye-Ola', or 'Ala-Cola" or anything of that sort, I would consider that I was getting what I asked for." (Rec., 1404-5).

WILLIAM DALTON, manager of the Health and Accident Insurance Co., New Orleans:

> "I believe my personal information is that all that stuff goes under a common name of 'Dope' or 'Koke', all those drinks." (Rec., 1559).

SCHEDULE III

Defendant's Testimony as to the Adoption and Use of "Koke".

On Sunday, October 2nd, 1887, Dr. J. S. Pemberton, who was then operating the Pemberton Chemical Co., and manufacturing "French Wine Coca", "Coca-Cola Syrup", "Gingerine", and other preparations, placed an advertisement in the Atlanta "Constitution" reading as follows: (Rec., 1278)

> "Wanted: An acceptable party with $2,000 to purchase a one-half interest in a very profitable and well-established manufacturing business. Absolutely no risk and guaranteed a 50 per cent. profit on investment, with possibilities of much larger profits. A rare opportunity to right party. A full investigation solicited. For particulars, address, with your name, 'Business, 8½ Marietta Street, Atlanta." (*Defendant's Exhibit* 13).

A. O. MURPHY, of Barnesville, Ga., (Rec., 1277-8):

> "I knew of J. S. Pemberton, of Atlanta, Ga. I first met him in 1887. My first introduction to him was through an advertisement that he had in the Atlanta 'Constitution' in something like, I think, October, 1887. * * * When I saw that advertisement I wrote to that address there, got in correspondence with him. I suppose we passed something like half a dozen letters."

Defendant's Exhibits 14 *to* 20, inclusive are the original letters written by Dr. Pemberton to A. O. Murphy.

A. O. MURPHY (Rec., 1279):

"When I first came to Atlanta I found Mr. Pemberton doing business down on Marietta St., I have forgotten the number. He had an office in front, a laboratory in the back, and in the basement he was making 'Wine of Coca', 'Coca-Cola', a cough syrup of some description, and I think perhaps a hair dye, and a preparation of some kind made from ginger, called 'Gingerine', something like that, I think that was the list. * * * There was nobody with Dr. Pemberton at that time, associated with him in business, that I knew of. He was making these preparations in a small way only when we came there. The first time I ever visited him he carried me back in his manufactory where he manufactured a bit in a small way. (Rec., 1279-80). * * * In December, 1887, I finally moved to Atlanta, and with Mr. Mayfield and Mr. Bloodworth, who was another townsman of mine, formed a partnership with Dr. Pemberton under the name of Pemberton Medicine Co. (Rec., 1279). * * * My first correspondence was between Pemberton and myself. Afterwards I drew into it my friend, Mr. Bloodworth, E. H. Bloodworth, who was of our town,***and,, also, a partner at that time, and, after we arrived in Atlanta, before we consummated the trade, we met Mr. Mayfield, J. C. Mayfield, from Alabama, who had also been in correspondence with him in reply to that advertisement in the 'Constitution', so after a conference between Mayfield, Bloodworth and myself, he came into the deal and we formed the partnership. All four, Pemberton, Bloodworth, Mayfield and myself had equal partnership. We each of us three were to pay $2,000 cash into the concern, and Pemberton was to have an equal interest and put up his laboratory, office fixtures, and

formulas, business, good-will, and one thing and another, as an off-set for the $2,000 each one of us put up. The formula for 'Coca-Cola' was included in that transaction. I drew up the partnership contract, what you might call a business agreement, stating the terms of the partnership. * * * It occurs to me I drew it up under the direction of Judge Simmons, my father-in-law, Judge T. J. Simmons. He was living with me at the time." (Rec., 1280-81).

J. C. MAYFIELD (Rec., 1586 and 1604):

"In 1887 an uncle of mine had formerly been in business, and we sold out in Rock Mills, Ala., and we had a little money, his name was Randall. Mr. Randall noticed an advertisement in the Sunday's 'Constitution' where the ad. wanted a partner to join in a manufacturing business. (1586). * * * *Defendant's Exhibit* 13, being a photograph of a page of the Atlanta 'Constitution' of Oct. 2nd, 1887, is the advertisement I spoke of. (Rec., 1604). * * * He called my attention to it, and I told him to answer the advertisement, and we got a reply from Dr. Pemberton. Well, we were both favorably impressed with Dr. Pemberton's letter, * * * and, of course, a few letters passed, and we both went to Atlanta and had a conference with Dr. Pemberton (Rec., 1586) * * * When we went to Atlanta we went to Dr. Pemberton's place of business to see him. His place of business then was 107 Marietta St., that is my recollection. He was doing business under the name of Pemberton Chemical Co., it was a two-story brick residence (Rec., 1605). * * * He showed us what he had, went over the whole business, made us his proposition (Rec., 1586). * * * He had an office in the front room, the back hall had his manufactured goods in it, all the first floor was used for the laboratory, his basement was also used, and Dr. Pemberton lived in the second story.

He was then making 'Wine of Coca', 'Coca-Cola', 'Globe Flower Cough Syrup', 'Indian Queen Hair Dye', 'Triplex Pills', he made a liniment, 'Mustang Liniment', his blood medicine, 'Pemberton's Stillinger', 'Pemberton's Compound Extract of Stillinger', I believe that he had a preparation that he called lime juice and ginger. That is about all I can remember now. During my visit there in 1887 I saw Dr. Pemberton actually making 'Coca-Cola' syrup (Rec., 1606). * * * We went back home and had the matter under discussion, and my uncle decided that he would not go in with it * * * but a few days thereafter I got a letter from the doctor that there was some other men figuring with him that would put in some money, Mr. A. O. Murphy and Mr. Bloodworth. We three met in Pemberton's place of business in Atlanta and went over his business very thoroughly, and we agreed to go in with him (Rec., 1586-87). * * * I was to put in $2,000, Mr. Bloodworth $2,000, Mr. Murphy $2,000, and Mr. Pemberton was to put in all his busines , stock of goods he had on hand, good-will, formulas, trade-marks, and everything of every nature and character pertaining to his business, for another fourth interest valued at $2,000. There was no agreement drawn up just at that time, but it was agreed, and I moved my family to Atlanta sometime shortly thereafter in December. Mr. Murphy, or Mr. Bloodworth, was a little bit delayed getting up their money, and it was sometime in January, 1888, that the articles of agreement were drawn up and signed by us all (Rec., 1587). * * * A written contract of partnership was drawn up between us (Rec., 1607). * * * It recited all the facts. We three were to put in $2,000 cash, Murphy, Bloodworth, and Mayfield, and Pemberton was to assign to us his assets, good-will, trade-mark, formula, stock on hand, and everything he had pertaining to that business he had, for one-fourth interest. * * * The right to sell and manufacture 'Coca-Cola' was included in that contract (Rec.,

1607). * * * I actually paid $2,000 into the partnership, Mr. Bloodworth paid in $2,000, it strikes me Mr. Murphy paid $1,500 and gave his obligation for 500." (Rec., 1608).

A. O. MURPHY (Rec., 1287):

"This (*Defendant's Exhibit 22*) is a paper covering the dissolution of the partnership, * * * an agreement between the four partners consenting to my retiring and their assuming all the obligations and everything in the business. In the caption of that contract the date is mentioned there when the partnership was formed. I suppose this is the exact date the partnership was entered into, or it would not have been specified in the agreement. It shows there as January 14th, 1888. * * * That is the original paper written by my brother, who is a lawyer (Rec., 1287). * * * I left the contract [the original partnership agreement of January 14th, 1888] with Mr. Mayfield and Mr. Bloodworth when I sold out. I had charge of the office up to that time. I kept it in my possession but of course all of the office papers were then turned over to them." (Rec., 1281).

J. C. MAYFIELD (Rec., 1607):

"I have not a copy of that contract now, nor the original. Mr. Murphy was the office man, Mr. Bloodworth was the road man, and I was the laboratory man. These papers were turned over to the office man, and after Mr. Murphy left us, Mr. Bloodworth was the office man, and he took charge of all papers of the company. I never had them in my possession, except as being connected with the firm."

MRS. FRANCES B. THOMPKINS (Rec., 1272):

"I am 29 years old. I live in Waynesboro, Ga.

My father is T. C. Banks. Mrs. Shelverton * * * is my aunt. I was present after the death of Mrs. Shelverton's father when she was looking over some of his papers. She and I were living in the same house. It was just about three and a half to four years ago. Mr. E. H. Bloodworth was my grandfather, and my mother was the oldest child. He lived at her home more than anywhere else, and I was living at home at this time. It was after my mother's death and grandfather's death,—I am a widow and live with Mrs. Shelverton. We were there cleaning out my grandfather's trunk, and we were going through to see if there was any of grandfather's papers we wanted, and so she picked up this paper, contract, some sort of legal agreement, I could not tell you exactly what it was. She read it to me and my brother sittnig there beside her. She said, 'Here is this old contract between my father and Mr. Pemberton,' and in this contract were enumerated numerous articles that were to be manufactured, and among them was 'Coca-Cola', and she read out the word, 'Coca-Cola', and she said to me, Isn't that awful to think that my father did not keep that.' She said, 'Think what we would have had today if he had not sold his formula to them, but had kept on manufacturing 'Coca-Cola,' and she said, 'Isn't it a shame that my father sold that, and that we are not making Coca-Cola today'. I remember the names that were signed to that contract, because she read them over to me and said, 'Look at this; it looks almost like lithographing'. My grandfather's name was there, and I think it was signed by Mr. Murphy, my grandfather, Mr. Bloodworth, and Mr. Mayfield. I have no idea of the date of the contract. After she read it, it was tossed and thrown into the fire with some other books and papers that we had. We had no use for it, and were getting rid of all his rubbish." (Rec., 1272-4).

MRS. N. L. SHELVERTON (Rec., 1269-1272):

"My father is E. H. Bloodworth. * * * I did have papers belonging to my father. I was the oldest living girl, and when my father died he just told me that his papers were in his trunk and that I should go over them and keep what I chose and destroy what I chose. Soon after my father's death we moved away from Atlanta, and I destroyed all that I thought I wanted to destroy. We have been away from Atlanta four years, and papa died four and a half years ago (Rec., 1269). * * * I did not destroy any papers without reading them. The paper that made the most impression upon me, that I hesitated to destroy, but finally did destroy, I am sorry, was this contract, and with this contract I also destroyed some cotton papers that have proved a loss to me since. He was a cotton man. This business contract, you know, a woman is not much of a business person, I suppose you would call it an agreement. It was some kind of a legal contract, you know, regarding, I believe, my father and these other gentlemen, Mr. Mayfield, Mr. Murphy, Mr. Pemberton and my father * * * who put up their money against the doctor's medicines, against Dr. Pemberton's medicines, I mean. * * * I remember some of the names of some medicines in that contract (Rec., 1270). * * * It had 'Wine of Coca' and 'Coca-Cola' in it, and, of course, that is the name that impressed me the most because it was then so much before the public. I do not remember the date of the contract. (Rec., 1271). * * * The parties to that agreement were Dr. Pemberton, Mr. Mayfield, Mr. Murphy and my father. The medicines described were 'Indian Queen Hair Dye', 'Globe Cough Syrup', 'Lemon & Orange Elixir', and 'Wine of Coca' and 'Coca-Cola'. Rec., 1272). * * * There were several of us, we were reading, and I did the reading. * * * Some of those that were present when I read them were my nephew and my niece. My niece's name was Mrs. Frances B.

Thompkins, and Charles E. Banks was the nephew, and we were sitting there, and I was destroying and reading them aloud." (Rec., 1271).

THOMAS C. BANKS, of Newman, Ga., (Rec., 1408-1413):

"Before I came here I lived in Atlanta. Engaged in the railway mail service, been in that business 29 years. I have lived in Atlanta for 25 years, twenty-five,—twenty-six years. I knew E. H. Bloodworth. He was my father-in-law. I went to Atlanta before he did. He came there, I think, in '87, perhaps, or '88. He went to live with me, he lived and occupied the same house at 8 Woodward Ave. We lived practically together most of the time. He came here to go into business with Mr. Mayfield, Mayfield and Pemberton, in the medicine business. He came here, it must have been in mid-winter, December or January, I do not recall the day or date. He went in business with them. They were making 'Coca-Cola', 'Koke', 'Stillinger', a blood medicine, and 'Lemon & Orange Elixir', 'Mustang Liniment', 'Queen Hair Dye', and 'Globe Flower Cough Syrup'. I recall those. Well, perhaps something else I have forgotten about. (Rec., 1408-9). * * * I cannot say I ever saw the contract of partnership. I heard them discuss it and all, but so far as reading the contract I cannot say I ever read it. * * * They came in possession of all those formulas for all those different drinks and proprietary medicines, in possession of all of them." (Rec., 1412-13).

MISS MARION BLOODWORTH (Rec., 1262):

"My father was E. H. Bloodworth. * * * He came here to go in business with Mr. Pemberton, Mr. Mayfield and A. O. Murphy. I was living here with my sister when he came. He went in business

with these parties, it was a medicine business, called the Pemberton Medicine Co. They came just before Christmas, it was in 1887 that they came here. * * * They made Globe Flower Cough Syrup, Coca-Cola, lemon & orange Elixir, and Wine of Coca, and some kind of hair dye, I do not remember that. Indian Queen Hair Dye, that was it." (Rec., 1262).

Plaintiff read into the cross-examination of Miss Marion Bloodworth an alleged affidavit purporting to have been made by E. H. Bloodworth in Atlanta on August 9th, 1905, in which the following statements were made. (Rec., 1265-6):

"In 1888 A. O. Murphy, of Barnesville, Ga., *Mrs. Diva Brozen*, and myself bought Dr. Pemberton's formulas, including 'Coca-Cola'. (1262). * * * Dr. Pemberton died soon after and we lost the 'Coca-Cola' name. We used the formula and called our goods 'Yum-Yum', but failed to successfully introduce it." (1266).

In so far as this alleged affidavit states that Dr. Pemberton sold all his formulas, including "Coca-Cola", to the Pemberton Medicine Co., it of course speaks the truth, but the substitution of *Mrs. Diva Brozen for J. C. Mayfield* as one of the partners in the Pemberton Medicine Co. is a piece of fiction. The original dissolution agreement, in evidence as *Defendants' Exhibit 22*, conclusively proves that Mrs. Diva Brown was not one of the partners, not to mention the testimony of A. O. Murphy, J. C. Mayfield, T. C. Banks, Miss Marion Bloodworth, Mrs. N. L. Shelverton, Mrs. Frances B. Thompkins, Asa G. Candler (Rec., 383) and F. M. Robinson (Rec., 360). That Mrs. Diva Brown had no interest in the business, but that J. S. Pemberton, A. O.

Murphy, E. H. Bloodworth, and J. C. Mayfield were the only parties having an interest in the Pemberton Medicine Co. is also shown by the letter-head of the Pemberton Medicine Co., on which the names of the four partners appear, a photograph of which, duly authenticated by the Commissioner of Patents, is in evidence as *Defendants' Exhibit 21* (Rec., 1285), and a reproduction of which will be found opposite page 130 of Appellants' Brief. The fact is also shown by the certified copy of an application for a charter by which it was proposed to incorporate the Pemberton Medicine Co., which document is in evidence as *Defendants' Exhibit 62* (Rec., 1616), and which recites the fact that Pemberton, Murphy, Bloodworth and Mayfield, doing business as the Pemberton Medicine Co., desired to be incorporated under that name.

This Mrs. Diva Brown was Mayfield's wife in 1887 and '88, and up until about 1898, when she secured a divorce and married a Judge Brown (Rec., 2419-20).

A. O. MURPHY, (Rec., 1290):

> "I suppose I had met Mr. Mayfield's wife. They lived in a different part of town from us, and perhaps I had been introduced to her by Mr. Mayfield. I just knew her as his wife. She had no interest in the business at that time, or during the time I was associated with it, whatever, nothing to do with it."

Plaintiff read into the cross-examination of John D. Fletcher (Rec., 1096) an alleged affidavit purporting to have been made by Mrs. Diva Brown, who died before this suit was brought. In this alleged affidavit Mrs. Diva Brown is represented as swearing, among other things, as follows:

"About 14 years ago I was one of the members of the J. S. Pemberton Med. Co., of Atlanta, Ga. The firm consisted of D. J. S. Pemberton, of Atlanta, Ga., Mr. Murphy, of Barnesville, Ga., (a brother-in-law of Judge Simmons, of the Superior Court of Georgia), Mr. Bloodworth, of Barnesville, Ga., Mr. Mayfield, of Atlanta, *and myself*. Dr. Pemberton put in the formulas of 'Coca-Cola', 'Pemberton's French Wine Coca', 'Indian Queen Hair Dye', 'Lemon & Orange Elixir', 'Globe Flower Cough Syrup', etc., into the firm, and each of the other members of the firm put in a certain sum of money. Mr. Murphy did the advertising, Mr. Bloodworth the bookkeeping, Mr. Mayfield *and myself* the manufacturing. Dr. Pemberton, who was in very poor health, superintended the manufacturing when well enough."

Mrs. Diva Brown stated the facts correctly in this extract, except for the addition of herself as a member of the firm and as having herself participated in the manufacturing.

On August 1st, 1899, Mrs. J. S. Pemberton, widow of old Dr. Pemberton, made an affidavit before Fred W. Burress, a notary public of Atlanta, Ga., which was also witnessed by C. H. Crimm, in which she swore (Rec., 1618):

"That my husband, Dr. J. S. Pemberton, was the originator of the formula for making 'Coca-Cola', 'Wine Coca', and other similar fount beverages; that Mr. J. C. Mayfield, of Atlanta, was associated with Dr. J. S. Pemberton long before and up to the time of his death, and it was under my husband's own personal supervision and instruction that Mr. Mayfield was taught to manufacture these and other similar specialties. To my personal knowledge Mr. Mayfield was an expert in the manufacture of both

the above commodities long before the present Coca-Cola and Wine Coca Companies were formed. * * * It is undoubtedly true that he is today the oldest and most efficient and experienced living man in the manufacture of those specialties, and the most reliable expert on the subject."

A printed copy of this affidavit is in evidence as *Defendants' Exhibit 66* (Rec., 1618), the original having been lost by one of the printers to whom it was sent as "copy." (Rec., 1619).

J. C. MAYFIELD (Rec., 1618):

"Mrs. Pemberton, on Aug. 1st, 1899, in Atlanta, Ga., did sign this certificate *(Defendants' Exhibit 66)*, which reads as follows: * * * I was in Atlanta on August 1st, 1899, when Mrs. Pemberton signed it (Rec., 1618). * * * Mrs. Pemberton turned the original certificate over to me after she signed it. It must have gotten lost at some of the printers. I had some of these things printed. I did keep it for quite a while, carrying it from place to place" Rec., 1619).

C. H. CRIMM, Tennessee Manager of the Germana Life Insurance Co. of New York (Rec., 1038):

"I know Mrs. J. S. Pemberton, the wife of J. S. Pemberton, just slightly. I witnessed a certificate signed by her (Rec., 1038). * * * Mrs. J. S. Pemberton signed the certificate about *1880* [1899] in Atlanta, Ga., in the old Norcross Building. * * * It was along the line that they were associated in business. Mrs. Mayfield was associated in business with her husband when they manufactured a beverage there several years ago,—along that line (Rec., 1039). * * * Q.—Do you remember the name of the beverage that she states in that certificate that her husband and J. C. Mayfield had

been manufacturing? A.—'Coca-Cola'. I don't know what became of the original certificate. I do not know what became of the gentleman who signed there as notary public, Mr. Fred W. Burress. He was a young lawyer there in Atlanta. I do not know [what] became of Mrs. J. S. Pemberton." (Rec., 1040).

Mrs. Pemberton died several years before this suit was brought.

J. C. MAYFIELD (Rec., 1588, 1608-9):

"Before the articles of agreement were signed, I was around his place of business all the time and was getting well posted as I could, because it was agreed that I was to do the manufacturing (Rec., 1588). * * * Q.—Now, was the formula for making 'Coca-Cola' made known by Dr. Pemberton to the members of that partnership at that time? A.—It was to me. * * * He got his formula book and called it over to me word for word before we left the Marietta St. place. * * * He was in bed sick, and we thought we ought to have it, you know, we were looking after things, and we had paid in our money. * * * He sent for me, and I went up to his sick bed, and he had the formula book, and I brought me a book, and I copied everything, word for word, as he gave it out, with complete instructions. * * * Q.—Was the formula for 'Coca-Cola' copied by you at that time? A.—It was (Rec., 1608). * * * After the formation of this partnership, the partnership took the name of Pemberton Medicine Co. Under that name we manufactured 'Wine of Coca', * * * 'Globe Flower Cough Syrup', the blood medicine, 'Lime Juice and Ginger', 'Coca-Cola', 'Indian Queen Hair Dye', * * * 'Lemon & Orange Elixir'. * * * After the formation of the partnership I made the 'Coca-Cola' syrup. When I made my first batch of 'Coca-Cola' syrup, Dr.

Pemberton was there, telling me, I had to do all things, and he would stand around and tell me how to do those things." (Rec., 1609).

A. O. MURPHY (Rec., 1285):

"Dr. Pemberton and Mr. Mayfield had charge of the laboratories. Of course, I was in them off and on and aided myself in making it with them, but they were recognized as the head of the laboratory department. Mr. Bloodworth was on the road. Mr. Mayfield knew the formula for making the product, that was done when Dr. Pemberton was at home. Mr. Mayfield was the practical man in the laboratory. Dr. Pemberton was simply directing him."

T. C. BANKS (Rec., 1412):

"Mr. Mayfield, I think it was, that actually mixed the syrup, this 'Coca-Cola'. * * * He learned from old Dr. Pemberton, I suppose, he was there to instruct him."

J. C. MAYFIELD (Rec., 1588):

"We did some manufacturing at his old place on Marietta St. * * * It seems to me like it was 107 Marietta, somewhere along there, it is below the post office. We did not like the place, and we looked for a new place on South Pryor St., I think it was the corner of Pryor and Hunter, and we moved down there, maybe it was the last of January. * * * We had the office on the first floor, and the laboratory and all this other stuff on the second floor, up stairs (Rec., 1588). * * * When we left 107 Marietta St., and went down to South Pryor St. *** we continued to manufacture and sell 'Coca-Cola' syrup under that name for two or three months. After we began to manufacture this Coca-Cola syrup, we sold it. The trade was small. I do not suppose we ever shipped any in the begin-

ning over 5 gallons, some gallon jugs, and the 5-gallon kegs was the most sizes that we put it in then. We might have shipped sample quart bottles, or something like that, to good people, considered that was more of a gift than anything else, a sample. * * * We put labels on these containers to indicate the contents of them; it had a label, 'Coca-Cola'." (Rec., 1610-11).

A. O. MURPHY (Rec., 1281):

"After we formed this partnership, we continued to manufacture down on Marietta St. a very short time, and then we moved up on Pryor St., Pryor and Hunter, and continued the manufacture there, right in the second story. My office was at first on the lower floor, and afterwards we moved the whole thing up-stairs (Rec., 1281). * * * We sold the entire line * * * The 'Wine of Coca',—it was a wine tonic put up in quart bottles, and 'Coca-Cola', the fountain syrup, and the 'Gingerine' were the three we pressed more than any others. * * * We manufactured and sold this product 'Coca-Cola' under that name." (Rec., 1282).

MISS MARION BLOODWORTH (Rec., 1264-1262):

"Immediately after this partnership was formed, they made and sold a product under the name of 'Coca-Cola'. I distinctly remember labels of 'Coca-Cola'. * * * The labels were pasted on kegs in one form or another, I just remember seeing it on top of the keg (Rec., 1264). * * * I used to go down to the place of business every few days. I drank that 'Coca-Cola' they were making. They were making a dark brown red syrup. It tasted like 'Coca-Cola' tastes now, and it looked like 'Coca-Cola'. They had little kegs, I would call them, for

shipping it out. They were painted red. They had 'Coca-Cola' on them." (Rec., 1262-63).

THOMAS C. BANKS (Rec., 1409):

"They were making 'Coca-Cola', * * * 'Stillinger', a blood medicine, and 'Lemon & Orange Elixir', 'Mustang Liniment', 'Queen Hair Dye', and 'Globe Flower Cough Syrup'. I recall those. Well, perhaps something else I have forgotten about. * * * This product 'Coca-Cola' was a drink * * * a soda fountain drink. * * * Color of it was a dark mahogany. * * * It tasted like the 'Coca-Cola' you get now, practically the same taste. I had occasion to go down to the places of these people frequently. * * * I often went down to the place of business during the time they were making that ['Coca-Cola'.] They were selling it, shipping it around and selling it to soda fountains. They put it in small kegs and jugs that I saw. The kegs were painted red. The kegs were marked 'Coca-Cola', in comparatively large letters (Rec., 1409). * * * I saw them making 'Coca-Cola' myself. I saw the labels, 'Coca-Cola'." (Rec., 1413).

A. O. MURPHY (Rec., 1282-4):

"Something like a couple of months, or perhaps it might have been more than that, or three months after that, this controversy with the old doctor in regard to 'Coca-Cola', in connection with his son Charlie, came up (Rec., 1282). * * * He sprung the question on us that he had sold the right to make 'Coca-Cola' to his son Charlie. Really, the way he expressed it, Charlie had, on certain occasions, obtained a written sale, a bill of sale, of this 'Coca-Cola' drink, and he would have to conform to it, but he would get us up a substitute which would be identically the same thing under a different name. Then arose the controversy in regard to that part of the business. This substitute he mentioned was not a

different product from the one that we had theretofore been manufacturing, except in name. * * * We had a discussion about trying to keep the name 'Coca-Cola'. One would naturally suppose we had quite a row over it among the partners, but the whole gist of the thing is this: After we had gotten our hands into the first and consummated the trade and got to work, and, as I stated a while ago, we found out to our sorrow that Dr. Pemberton was a drug fiend, and that of course was distasteful to any business man, * * * and the crowning act was when he violated his contract in regard to this 'Coca-Cola' syrup, and we, of course, had quite a warm time of it for a little while, and he had to pacify us with the idea that we put out identically the same thing under a different name (Rec., 1283-4). * * * Most anybody acquainted with the history of these drinks knew that about that time 'Coca-Cola', 'Wine of Coca', or none of these drinks were very prominent. They were all in their infancy, in fact, that drink idea, soda fountain drink idea, was in its infancy, and rather than break up the whole thing and create a row among partners, you might say, we tacitly and silently went to work to see if we could off-set it in some other way (Rec., 1284). * * * We first started out with the name caled 'Yum-Yum', and then we got on to one or two others, 'Koke' (Rec., 1283). * * * We held to 'Koke' after we used 'Yum-Yum' a while, and abandoned that and then agreed on 'Koke'. * * * *'Koke' was adopted for the product in the spring of '88.* * * * The product was all labeled, whether it went out in the shape of kegs or barrels. We did not use much barrel stuff, of course, then; we were too little. Sometimes it went out even in smaller quantities than that, and, when put out, it was, of course, labeled just like 'Wine of Coca' was labeled, *labeled with this word 'Koke'*. Those barrels and kegs, to my recollection, were painted just common red." (Rec., 1284).

J. C. MAYFIELD (Rec., 1588-9, 1612-13):

"Dr. Pemberton was in bad health. We did not know at the time what was the matter with him, but it developed later that he was a drug-fiend. Of course, we were all very much put out by the fact (Rec., 1588). * * * After we had manufactured and sold 'Coca-Cola' for two or three months, Dr. Pemberton stated to us one day that he had decided to give 'Coca-Cola' to his son. * * * I knew he had been having trouble with his son, he was an unruly bad boy, and he reported to us that he would have to give it to him to keep peace in the family (Rec., 1612). * * * Dr. Pemberton had a son, an only child, Charley Pemberton, who knew all about manufacturing these specialties. * * * He discussed it with me, that he would do the manufacturing, but it was agreed and understood that I would do the manufacturing. Naturally, it cut the son out of a position. He was disgruntled, dissatisfied, and made it up for the old man, Dr. Pemberton. * * * He said he would have to give him that business in order to keep peace (Rec., 1588-9) * * * but we did not agree, this was after I bought a fourth interest in 'Coca-Cola', after we had been manufacturing and selling and going around satisfied with the business. The old doctor was sick, and kept fretting around about it, and said it was not of much value, and did not think 'it had been very long on the market'; we had the same formula and could go on and make the same goods under some other name and he would appreciate it. * * * The other partners and I did not agree to any sale or assignment of the business of manufacturing and selling 'Coca-Cola'. * * * We went ahead and sorter accepted the situation in a way. * * * We tried to have peace in the family if we could, and we discussed among ourselves what to call our 'Coca-Cola', and agreed upon the name 'Koke' (Rec., 1612-13). * * * *We used a label* to designate the goods, of course, *and placed*

on the label 'Koke', spelled 'K-o-k-e'. The product was no different from the product 'Coca-Cola', there was no difference between the product which we thereafter labeled 'Koke', and 'Coca-Cola'. We continued to manufacture 'Koke' by the same formula that old Dr. Pemberton turned over to us as the 'Coca-Cola' formula. *After we had changed the name of this product from 'Coca-Cola' to 'Koke', [when] we received orders from our older customers for 'Coca-Cola', we shipped them 'Koke',* and wrote them a nice letter and explained the situation and conditions, which were always satisfactory; I never heard any complaints." (Rec., 1613-14).

MISS MARION BLOODWORTH (Rec., 1263):

"They made this 'Coca-Cola' three or four months;; then they still made it and *called it 'Koke'.*"

THOMAS C. BANKS (Rec., 1410):

"If there was any difference between this preparation they called 'Koke', and the preparation called 'Coca-Cola', I could not tell it from drinking it and looking at it. It appeared to be the same. It was supposed to be practically the same thing, I think, under different name (Rec., 1410). * * * *I first saw the change from 'Coca-Cola' to 'Koke' during the summer sometime, or spring-time.* I cannot recall the exact time, but [it was] after they had been in business for some time. My father-in-law (E. H. Bloodworth) told me about this trouble with Dr. Pemberton. (Rec., 1414-15).

ASA G. CANDLER, president of the Coca-Cola Co. (Rec., 382):

"That company's (The Pemberton Medicine Co's.) business was manufacturing 'Wine Coca',

and they undertook to manufacture,—it was a hair dye, and they had 'Globe Flower Cough Syrup', and 'Compound Stillinga', and shortly after I bought 'Coca-Cola', they started out manufacturing a soda fountain drink which was as near like 'Coca-Cola' in color as they could get it,—that is, a man named Mayfield that was connected with that company, he called it 'Yum-Yum'. * * * I am not certain whether that was manufactured by the Pemberton Medicine Co. or by J. C. Mayfield,—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. * * * I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that's right, they were connected with the Pemberton Medicine Co. * * * These people, Mayfield, Bloodworth and Murphy, were running the Pemberton Medicine Co., I don't think they ran it long,—and *they were manufacturing a drink similar to 'Coca-Cola' at that time.* (Rec., 382). * * * *You ask whether April 14th, 1888* * * * *was the first time I ever owned any interest in 'Coca-Cola'; * * * I believe it was, I can't say positively, it looks like it, that's the record.*" (Rec., 382).

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co. (Rec., 358), and for 22 years its secretary):

"Dr. Pemberton and some other gentlemen formed the Pemberton Medicine Co. * * * I think they operated on South Pryor Street. They did a medicine and extract business, they manufactured these articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks,—cola's,—to some extent (Rec., 359). * * * XQ.—You knew they were manufacturing drinks and putting them on the market? A.—I heard they were manufacturing drinks, yes, sir. XQ.—That was part of the history of the community, that they were doing that? A.—Yes, sir. As to the asso-

ciates whom Dr. Pemberton had in the Pemberton Medicine Co., I just remember that a man by the name of Mayfield was one of them, and a Mr. Bloodworth was another one,—I don't remember his name now,—Murphy, I guess it was (Rec., 360). * * * The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. Yes, I observed that just like I did Hagan & Dodd's, what comes out. * * * I don't know anything about the quantities they manufactured or sold, but I know [that they made and sold a cola drink] just as well as I know that Hagan & Dodd manufacture 'Ko-Nut', but I don't know anything about the extent of it" (Rec., 364-5). * * * The other products that were gotten out by the Pemberton Chemical Co., aside from 'Coca-Cola', were 'Pemberton's French Wine Coca', 'Globe Flower Cough Syrup', 'Indian Queen Hair Dye', and a preparation called 'Gingerine'. So far as I know, it went from the Pemberton Chemical Co. to the Pemberton Medicine Co. (Rec., 362).

J. C. MAYFIELD (Rec., 1614):

"After we had adopted and applied this name 'Koke' to our product, the partnership as then organized continued up to about, I believe, some time in June, [when] Mr. Murphy withdrew *(Defendants') Exhibit 22* is an agreement whereby we agreed to let Mr. Murphy withdraw from the partnership. We all signed that. That is my signature, those are the signatures of the other parties. I recognize them as the genuine signatures. *Exhibit 22* correctly sets forth the agreement we entered into at that time. After the retirement of Mr. Murphy, we continued the business as a partnership, us three, instead of four, Mr. Murphy had withdrawn, Mayfield, Bloodworth and Pemberton. *We continued to manufacture and sell 'Koke'* (Rec. 1614). * * * A short time thereafter Dr. Pemberton died. * * * We had to make a settlement, of course.

with the Pemberton estate, Mrs. Pemberton and her son (Rec., 1590-1). * * * Mr. Bloodworth and I had a conference with Mrs. Pemberton. * * * We did not care to go on with the partnership, and we wanted to divide up (Rec., 1615). * * * Mrs. Pemberton took the formula and business of the 'Indian Queen Hair Dye', and we had quite a lot of manufactured goods, and we gave her one-third of the manufactured products (Rec., 1591). * * * Mrs. Pemberton did not get any interest in 'Koke', or the 'Koke' formula (Rec., 1615). * * * After that Mr. Bloodworth and I continued in business. * * * He and I went on as partners. He and I owned the business equally (Rec., 1615). *** We moved then around from the South Pryor St. Place to Trinity Ave., in a little cottage we got for a good deal less money (Rec., 1591). * * * Mr. Bloodworth kept the books, I did what manufacturing was to be done (Rec., 1591). * * * *Mr. Bloodworth and I continued to manufacture and sell 'Koke' until 1895,* right after the Cotton States Exposition, after the fair there, 1895. And then I bought out Mr. Bloodworth Rec., 1615). * * * *After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Company of America.* I have sold it in receptacles labeled with the name 'Koke' during all of that time (Rec., 1616-17). * * * Paper marked Defendants' Exhibit 63 is the charter of the Koke Company of America. I sold the Koke Company of America all my interest in everything I had in the 'Koke' business. * * * The Koke Company of America has continuously owned the 'Koke' business * * * from its organization down to date. The Koke Company of America sell to their agents, give them a license to do business in a certain territory. The Southern Koke Co., Ltd., is just an agent to the Koke Company of America, a selling agent, * * * and the Koke Company of Texas, all the same, are licensees for certain territory." (Rec., 1617-18).

The continuous manufacture and sale of Koke, from 1888 to date, is shown by the following witnesses, one of whom (McGraw) bottled and sold Koke to retailers from 1900 to date:

Thomas C. Banks (Rec., 1411).
Miss Marion Bloodworth (Rec., 1267).
H. C. Groves (Rec., 1213).
L. A. Holley (Rec., 1274).
George R. Edmondson (Rec., 1299-1300).
S. T. Mayfield (Rec., 1457, et seq.).
W. F. Boylin (Rec., 1073).
W. M. Sidebottom (Rec., 1162).
J. B. Freed (Rec., 1172).
P. B. McGraw (Rec., 1313).
C. N. Baker (Rec., 1406).
J. W. Mayfield (Rec., 1518, et seq.).
R. J. Baker (Rec., 1303).
M. Casey (Rec., 1305).
W. B. Arnold (Rec., 1308).
Oliver Prince (Rec., 1319).
G. W. Freeman (Rec., 1327).
W. F. Neal (Rec., 1328).
A. S. Joseph (Rec., 1331).
Mrs. M. L. Edwards (Rec., 1338).
H. O. Adams (Rec., 1343).
E. D. Montgomery (Rec., 1357).
A. F. Watkins (Rec., 1377).
John Smith (Rec., 1387).
J. C. Mayfield, Jr. (Rec., 1565).
L. E. Whitmire (Rec., 1699).

SCHEDULE IV.

Defendants' Salesmen Have Not Aided, Encouraged, or Induced Retail Dealers to Sell Defendants' Goods As the Goods Of Plaintiff.

E. R. ALBRIGHT, of Albright & Wood, retail druggists, Mobile, Ala. (Rec., 546):

> "He wanted to sell a syrup called 'Dope'. * * * He said it was to be supplied when people asked for 'dope', and that they had the name 'Dope' copyrighted, &c., and that I had just as much right to give a man 'Dope' when he asked for 'dope' as I did to give him Coca-Cola when he asked for 'Coca-Cola', and he based his argument on these facts,—*he didn't try to sell it as a substitute for Coca-Cola.*"

I. V. WOOD, of the firm of Albright & Wood, Mobile, Ala. (Rec., 568):

> "The representative of the Koke Company *did not ask me to come out and substitute this product for 'Coca-Cola'.*"

PIERRE AUGUSTE CAPDAU, retail druggist, New Orleans, La., (Rec., 664), tells a long story about some man he had never seen before and whom he has never seen since, whose name he didn't get, and the only thing about whom he can remember is that he had a black mustache. (Rec., 666).

No one in the employ of defendants ever had a black mustache. (Rec., 1513; 1573). The only person in this

record with a black mustache is plaintiff's detective, H. B. Pierce.

GEORGE C. KERSHAW, a retail druggist, Dallas Texas, (Rec., 811), tells about the representations made to him by a salesman of some concern in no way connected with the defendants. The man who called on him was a representative of the *Coke* Company, of *Pine Bluff, Arkansas,* (Rec., 812) one of defendants' *competitors.*

Plaintiff has made use of this testimony again and again notwithstanding that attention has been called to the fact that Kershaw's story concerns a salesman of the *Pine Bluff* company and not of the defendants.

CECIL V. ROGERS, a retail druggist, Dallas, Texas, says:

> "I had a call from a salesman representing the Koke Company of Texas, in reference to 'Koke'. * * * The salesman wanted to put in 'Koke' to be served at the fountain. While he didn't exactly make reference to the fact that it could be served for 'Coca-Cola', he made mention of the fact that when people called for 'coke' give them 'Koke'; and when they called for 'coke' they were more than likely to mean they wanted 'Koke' than 'Coca-Cola'." (Rec., 736).

CHARLES R. SMITH, a retail druggist, Dallas, Texas. (Rec., 747):

> "They said if people came in and asked for 'Koke', just to give it to them."

T. Q. MARTIN, proprietor of the Owl Drug Store, Dallas, Texas. (Rec., 765):

"He came and asked me to sell 'Koke', and said it was *just as good as* 'Coca-Cola', from the fact that it was being manufactured at Dallas, and as a patriotic citizen I should sell it, and that I would not be deceiving the customers, because a man should get what he called for, if he called for 'Koke' that we should have the 'Koke' to give him."

E. B. THOMAS, a confectioner, Dallas, Texas. (Rec., 768):

"You ask if * * * anything was said as to whether or not my customers would be able to tell the difference; well, I don't know exactly on that, but my best recollection on that is that there would be no one that would make any kick on it at all if they called for 'coke' and we gave them 'Koke',—there would be no kick on it; that it was *a first-class article*, and that I could sell it *as good as I could 'Coca-Cola'*."

It is true that Robert Chidsey, a soda dispenser, Mobile, Ala., (Rec., 559), says that one of defendants' salesmen endeavored to get him to sell "Koke" for "Coca-Cola". On cross-examination, however, he said (Rec., 561):

"Yes, sir; I am sure he used the words *in the place of* 'Coca-Cola' and not *as a substitute for* 'Coca-Cola'."

It is plain that this witness did not appreciate the distinction between a proposition to sell "Koke" when "coke" and "dope" were called for, and a proposition to sell "Koke" when "Coca-Cola" was asked for.

This is illustrated by Dave S. Bauer, (Rec., 536-37):

"You ask if anything was said about substituting

> 'Koke' for 'Coca-Cola'; that was one of the first things that he told me, that I could sell 'Koke' and 'Dope', and that the calls for 'Coca-Cola', the public wouldn't know it, and couldn't tell the difference. * * * That is pretty much what he said, I think, after first trying to induce me to buy his syrup, as I understood it, as a *substitute* for 'Coca-Cola'. * * * I said, 'Well, I am going to see that they do not serve it.' He says, 'How are you going to do that?' Then I showed him a sign on the fountain that said, 'If you want "Coca-Cola", please call for it by its correct name; that is the only cola drink we serve at this fountain.' Then, in addition to that, that when a customer *calls for 'Coca-Cola'*,—that is, when they call for *'coke'* or *'dope'*,—to tell them they want 'Coca-Cola'."

Bauer makes it plain that the salesman evidently told him that he could sell "Koke" when "coke" and "dope" were asked for, and he construed that as a proposition to sell "Koke" when "Coca-Cola" was asked for; and, in giving his testimony months later, in endeavoring to repeat what the salesman had said, he used his *own* language and not that of the salesman, and substituted the words *"Coca-Cola"* for what the salesman had said, —*"coke"* and *"dope"*. And that is evidently how Robert Chidsey came to make the statement that the defendants' salesman told him he could sell defendants' products as and for plaintiff's, because all the other witnesses agree that defendants' salesmen not only were not endeavoring to get dealers to pass off other goods for plaintiff's goods, but were denouncing substitution as a fraud and an evil, and urging dealers not to substitute "Coca-Cola" when "Koke" and "Dope" were asked for. It does not seem reasonable that a salesman would in one breath renounce as a fraud what he was about to ask the dealer to do in the next breath.

SCHEDULE V.

Defendants' Goods, Except in a few Isolated Instances, Have Not Been Passed Off As Plaintiff's Goods.

In Plaintiff's Schedule 6 under the caption "Respondent's Product Has Been Systematically Passed off on the Public as and for Coca-Cola", plaintiff cites only two witnesses whose testimony tends in the slightest degree to support the pretentious claim thus made, namely, D. P. English and B. W. Fuller, the former now an exclusive dealer in "Coca-Cola", and the latter now a soda dispenser in an exclusive "Coca-Cola" establishment.

There is no pretense that defendants had any sort of knowledge of the alleged circumstances these two parties relate, or that defendants are in any manner responsible for what they say occurred. If their statements could be accepted as true and taken at their full face value what they say would not sustain the extravagant claim that defendants' goods have been "systematically and habitually sold to the public as 'Coca-Cola',"—at best it would only go to show that in two isolated cases, wholly unknown to the defendants, a dishonest drug clerk in one instance, and a dishonest soda dispenser in another, served patrons of the fountains where they were employed with defendants' goods when "Coca-Cola" was asked for, and that in one case this practice continued only about a month before it was stopped by the management, while in the other it continued about two and a half months, when it was entirely discontinued. Of course, defendants could not be held responsible for what a dishonest clerk, or even a dishonest retail dealer, might do without their knowledge, consent of acquiescence,

and without aid, suggestion or inducement from them. *Coca-Cola Co. vs. Branham, et al,* 216 Fed., 264; *Mumm vs. Kirk,* 40 Fed., 589.

But as a matter of fact, the stories these two youngsters tell are of exceeding doubtful occurrence.

English says he was employed at the Palace Drug Company, Dallas, Texas, from May 1st to December 1st, 1913. (Rec., 803); that J. G. Pyle was manager only until July 15th, 1913, when Messrs. Florence & Nossick took over the business, and thereafter carried "Coca-Cola" exclusively. (Rec., 802). He says that during the two and a half months that Pyle was manager, from May 1st to July 15th, 1913, when people came into the store and asked for "Coca-Cola", the soda dispensers would serve them "Koke". (Rec., 802). He says that during that time the Palace Drug Company "handled Koke, and I *think* they handled it exclusively. I don't *think* they handled any 'Coca-Cola'. I never heard of them buying any while I was there." (Rec., 802). He admits, however, that he was only the prescription clerk, (Rec., 803), and that, "of course, I did not buy the soda fountain syrups which they served, myself. I don't remember that I ever ordered any." (Rec., 807). He admits that he did not even bring up the syrups from the basement and put them in the fountain, but that the negro porter always did that. (Rec., 804). and that as a matter of fact "Koke" and "Coca-Cola" were so nearly alike that he could not tell, from looking at or tasting the syrup, whether it was "Koke" or "Coca-Cola" that was actually in the fountain. (Rec., 804). He admits that "the part of the store which I occupied was the prescription department," and that "the prescription department is in the rear of the store,

and, as a rule, I am not visible while making prescriptions,—I made them behind the counter. I had nothing to do with the soda fountain at all." (Rec., 803).

On the other hand, J. G. Pyle, the manager of the store, says, "I carried both 'Coca-Cola' and 'Koke'," (Rec., 1722), and shows that during the two and a half months that he was manager in 1913, he purchased 600 gallons of "Coca-Cola". (Rec., 1723). He says that "Koke" was kept in one compartment in the fountain, and "Coca-Cola" in another, (Rec., 1722); that "Koke" was kept in the "simple syrup" jar, while "Coca-Cola" was kept in a jar labeled "Coca-Cola", (Rec., 1727); that he always kept two regular soda dispensers, (Rec., 1721), who had specific instructions to always serve "Coca-Cola" when it was asked for (Rec., 1722); and that "Koke" was never sold when "Coca-Cola" was asked for, to his knowledge. (Rec., 1723).

It is plain, therefore, that when English said it was "Koke" that was served on calls for "Coca-Cola", he was not stating a fact within his own knowledge, but an inference he had drawn from the erroneous assumption that the store had nothing but "Koke" in the fountain. He knew the dispensers were serving *something* when "Coca-Cola" was called for, and, being under the mistaken impression that they had *no "Coca-Cola"* to serve, jumped at the conclusion that they must be serving "Koke"; but, as the store did carry "Coca-Cola" as well as "Koke", and carried it for the express purpose of supplying the demand for "Coca-Cola", and as the dispensers were strictly enjoined to always serve "Coca-Cola" when it was asked for, it is highly proable that what they actually served to those who demanded "Coca-Cola" was, in fact, "Coca-Cola", and that English's as-

sumption that it was "Koke" was due entirely to the unwarranted inference drawn from the false premise that "he did not *think*" they had any "Coca-Cola".

On cross-examination English went a step further and said that he himself had served drinks at the fountain, and that he personally had sold "Koke" for "Coca-Cola". Thus:

> "I mean to say that I sold 'Koke' for 'Coca-Cola'. * * * In the morning before the others got down I served a good many drinks. (Rec., 803). * * * You ask how often I served behind the counter; I would open the store every other morning, and I would be there usually about twenty minutes before any of the other clerks got down, and people would call in and ask for 'Coca-Cola' and I would serve them." (Rec., 804).

But, as he was under the mistaken impression that there was no "Coca-Cola" in the fountain, and that it was all just "Koke", it is obvious that he might have been, and probably was, actually serving "Coca-Cola" without knowing it. He admits that he invariably drew the syrup for the drinks he served from the jar labeled "Coca-Cola", (Rec., 804) which was the jar containing the "Coca-Cola". (Rec., 1727).

He admits that the manager, J. G. Pyle, did not open the store in the morning (Rec., 806), and that "I couldn't say that I reported to my bosses that I was serving 'Koke' as 'Coca-Cola'. (Rec., 805) * * * I never did go to Mr. Pyle and tell him about anything like that." (Rec., 806). He adds, however, that "there wasn't any occasion for me telling him I was palming it off, because he knew it,—he was buying it and knew what went in." (Rec., 805-6). But this was just another inference

based upon the erroneous supposition that Pyle hadn't bought any "Coca-Cola", and, consequently, must have known it was "Koke" and not "Coca-Cola" that was being served when "Coca-Cola" was asked for. As Pyle had bought "Coca-Cola", and 600 gallons of it at that, it is clear that English's inference was not justified.

Finally, English says that he personally served drinks from the fountain, not only early in the mornings before the other clerks got down, but at various times throughout the day, and that Pyle saw him serving drinks there day after day, and repeatedly saw him serving "Koke" for "Coca-Cola". (Rec., 806). He says:

> "I never made any record of the number of times he has seen me behind there, but it has been a good many times. There were only a very few days at a time when he did not see me behind the counter at some time during the day serving drinks. I have no doubt he saw me serving 'Koke' for 'Coca-Cola'. You ask if I am sure that he did; yes, he saw me." (Rec., 806).

If it were true that English really did serve drinks at the fountain, and that Pyle saw him doing so, and saw him serving *something* to people who asked for "Coca-Cola", that wouldn't be any indication that Pyle had the slightest idea but what English was serving "Coca-Cola" on all such calls. Both "Koke" and "Coca-Cola" were in the fountain; the dispensers had very positive orders to always serve "Coca-Cola" when it was asked for; and Pyle would naturally have assumed that his orders were being obeyed. If he had observed the jar from which English invariably drew the syrup he would have seen that it was the "Coca-Cola" jar, and would have known that what he was serving was indeed

"Coca-Cola". English's statement that Pyle "saw him serving 'Koke' for 'Coca-Cola'," is nothing more than an unfounded assumption. English "thought" there wasn't any "Coca-Cola" in the fountain; he "thought" the jar labeled "Coca-Cola" contained only "Koke" (Rec., 804); and, consequently, he "thought" that what he was serving was "Koke", and that Pyle, who purchased all the soda fountain syrups, must have known it; when, as a matter of fact, "Coca-Cola" and "Koke" were both in the fountain, in separate containers,—the "Koke" in the "Simple Syrup" jar and the "Coca-Cola" in the jar labeled "Coca-Cola" from which English drew the syrup for the drinks he made,—and whether he knew it or not, what English was serving all the time was "Coca-Cola".

But the truth is, as English at first swore, that he was only the prescription clerk, that he occupied the prescription department at the rear of the store where he could not see what was going on at the fountain, and that he did not serve any drinks at the fountain and had nothing to do with the fountain department at all. (Rec., 803).

J. G. PYLE:

> "We did business in Dallas, Texas, under the name of the Palace Drug Co. At that time we had in our employ D. P. English. * * * He is a prescription man. I never saw him dispense any, if he did it was while I was out. He never did any of it. I always kept a couple of soda men, and, if he ever dispensed any, I did not know it. (Rec., 1720-1). * * * I do not suppose he ever drew a drink, unless he did it for himself, sometimes those fellows will draw their own drinks, but I never did know him to sell a drink of any kind. * * * It

was not his business to do it. (Rec., 1722-3). * * * I gave the dispensers instructions with reference to the sale of 'Koke' and 'Coca-Cola'. I had *several* [*separate*] compartments to keep it in, and I told them if they called for 'Coca-Cola' to give 'Coca-Cola', and if they called for 'Koke' to give them 'Koke' I never told any of our dispensers to substitute 'Koke' when 'Coca-Cola' was asked for. I never told D. P. English to substitute 'Koke' when 'Coca-Cola' was asked for, because I never thought he had anything to do with the 'Coca-Cola' business. * * * None of our dispensers, or D. P. English, or any one else connected with our establishment during the time we were handling 'Koke', ever sold 'Koke' when 'Coca-Cola' was asked for, to my knowledge. I never heard that they had done so. I always instructed them not to do it. If they did it, they did it against my instructions. (Rec., 1722-23). * * * Of course, I could not stand there and watch them and see what they were serving. I took it they did what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. (Rec., 1728). * * * It would not be difficult for a soda man to know which he was serving. (Rec., 1727-8). * * * They could have mistaken one for the other, if they had been side by side and no labels on them. They could have gotten them mixed up, but we were very careful not to get one in the other; there was no reason to do so." (Rec., 1728).

The alleged substitution of "Koke" for "Coca-Cola" was evidently an after-thought with English. He said that, when he was called on by plaintiff's representative for the purpose of securing him as a witness, "I did not tell him this story about *substituting* 'Koke' for 'Coca-Cola'. * * * I did, however, tell them that I was *serving* 'Koke' *instead* of 'Coca-Cola'." (Rec., 806-7).

The other witness plaintiff has produced to prove that defendants' goods are systematically and habitually sold to the public as 'Coca-Cola' is B. W. Fuller, who says: (Rec., 833-4).

> "The Kirby Drug Co. at one time dispensed 'Koke' over its counter. They carried it exclusively * * * the last month or so while I was there. You ask if they sold it as 'Koke' or as 'Coca-Cola'; they sold it as both. If a man came in and called for 'Coca-Cola' they served him 'Koke',—they didn't have anything else to serve him, sometimes they told him what they were selling, told him it was 'Koke' and sometimes they didn't,—supposed to tell it along towards the last, they were supposed to tell him it was 'Koke'. You say you are not trying to find out what they were supposed to do, but whether 'Koke' was sold by the Kirby Drug Co. as 'Koke' or as 'Coca-Cola'; as both,—first it was sold as 'Coca-Cola', as long as it lasted, and then they sold it as 'Koke'. It must have been about a month, I guess, that they sold it as 'Coca-Cola'. (Rec., 833-34).***You ask if my boss did not tell me to tell customers that we were serving 'Koke'; that's along towards the last part, he told me to tell them I was selling them 'Koke'. (Rec., 835).***Towards the last I sold it as 'Koke' to them, I did not pretend it was 'Coca-Cola'. When I left the company***my last service there, I was serving 'Koke' pure and simply to my customers, and they knew it." (Rec., 835-36).

The witness was evidently confused. It seems that up to the last month or so the Kirby Drug Co. carried both "Coca-Cola" and "Koke", and, when he says, "first it was sold as 'Coca-Cola', *as long as it lasted,* and then they sold it as "Koke'," what he evidently had in mind was that they sold what "Coca-Cola" they had left on hand as "Coca-Cola" as long as it lasted, and then, when

it ran out, and they had nothing left but "Koke", they then told their customers that what they were serving was "Koke".

It is highly significant that Fuller, who was formerly one of the soda dispensers at the Palace Drug Co. (Rec., 833), was not even asked by plaintiff if "Koke" was ever substituted for "Coca-Cola" at that store. Evidently plaintiff preferred to prove the fact by a prescription clerk who admitted he had nothing whatever to do with the soda fountain department.

Plaintiff quotes some extracts from the cross-examination of twelve of defendants' witnesses, stating in the caption that these extracts demonstrate the deliberate and systematic passing off of the respondents' product for 'Coca-Cola'." This must be intended for a joke, because certainly none of these witnesses says he sells defendants' goods for plaintiffs. On the contrary, they all distinctly state that they *always serve plaintiff's product when asked for "Coca-Cola", and that it is only when* their *customers ask for "coke", "dope", "shot-in-the-arm", or some such expression* that indicates merely the *kind* of drink desired without giving any information as to what, if any, brand is preferred, *that they ever serve defendant's product.* These witnesses do state, of course, defendant's product costs them less than plaintiff's, that they are in business to make money, and that they naturally like to handle defendants' goods because they can make a larger margin of profit on them, and that, therefore, they prefer to sell defendants' goods, and nearly always do sell them, when customers do not mention the brand of cola drink they prefer but just ask generally for that kind of drink. This, however, is in

no sense a sale of defendants' goods and plaintiff's goods.

Plaintiff places great emphasis upon the testimony of four of plaintiff's detectives, Hogan, Bogner, Gillon and Wilkins, showing the names and addresses of the dealers in bottled goods from whom they purchased some 35 or 40 bottles of "Koke", together with the dates of the purchases and the pages of the record where the testimony relative thereto may be found.

Not one of these detectives was decieved in the slightest by what he got. Each one of them knew, as soon as he saw the bottle, that it was "Koke" that was being handed out to him, and not "Coca-Cola", and *it is plain from an inspection of the bottles themselves, that anybody would have known so, too.*

Clarence J. Hogan and B. J. Gillon, two Pinkerton detectives (Rec., 648, 659) made their purchases together. All told, they found four saloons out of twenty they visited that handed them bottles of "Koke" when they asked for "Coca-Cola". (660). Plaintiff's exhibit 113 to 122, inclusive, represent the bottles they purchased.

CLARENCE J. HOGAN: (Rec., 649):

> "We have produced all the 'Koke' that was offered us for 'Coca-Cola'. * * * These purchases here are the only ones as to which we got results. * * * You say you take it for granted we were not deceived when we got it; why sure not. *** Sure we knew what it was when we got it. * * * There were places where we asked for 'Coca-Cola' and they didn't have it, but told us they had nothing but 'Koke'. In such instances as that we didn't take

anything, but walked out of the man's place. I haven't the slightest idea how many places of that kind we went into, unless I would refer to my notes, ***but we did go to a great many places where they told us they had no 'Coca-Cola' and offered us 'Koke'." (Rec., 649-50).

B. J. GILLON, (Rec., 661-2):

"In each place we went into, we called first for a glass of 'Coca-Cola', and they served us out of the bottle,—they poured it out of the bottle into the glass,—and we drank from the glass. They gave us a drink, which we drank in each instance. When we drank the drink, we asked for a bottle of that drink under some circumstances, and under other circumstances we didn't ask for it. In each instance I saw the drink which was served to us in the bottle which it was served, and, in those cases where we got a drink in a glass, I knew what the bottle contained before I drank the stuff, so that I was not deceived at any time by what I drank. In each instance where I ordered a drink and got it in a glass, and followed it up by an order of a bottle, in each such instance I saw it was a bottle of 'Koke' that had been served me in a glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, I was satisfied it was 'Coca-Cola'."

FRANK J. BOGNER, (Rec., 652-3):

"Mr. Condon and myself went into a bar-room, called for a glass of 'Coca-Cola', and they took out a bottle of 'Koke', poured it in a glass, and we drank a part of it; then we asked them to sell us a bottle to take with us,—a bottle of 'Coca-Cola',—and they wrapped up a bottle of 'Koke'. * * * We kept it up, I suppose, two or three weeks. Yes, sir, that's all we got. * * * Some places told us they had

> 'Koke' and didn't have 'Coca-Cola',—a great many places told us that, and, of course, when they offered us 'Koke', why then we didn't buy it.*** Yes, sir, we have produced all the 'Koke' we got in our search. We were employed to get that stuff if we could; we went out to see if they would sell us 'Koke' for 'Coca-Cola'.***We went to see if we could get a substitute for 'Coca-Cola', and, when we got it, we got what we were searching for, got the evidence against him. Of course, when those fellows gave us a bottle wrapped up, we knew we had them." (Rec., 653).

GEORGE H. WILKINS, (Rec., 886):

> "You ask if I didn't know these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case they were wrapped up. Of course, I could not tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew that they were not 'Coca-Cola'.

The mere offering, or selling, of one product to a purchaser when another is asked for does not necessarily constitute unfair competition, nor does it necessarily amount to a sale of the one product "as and for" the other. It is only when *deception* is practiced,—when the purchaser is deceived and thinks he is purchasing and receiving goods of one manufacturer when in fact he is receiving goods of another manufacturer,—or when there is a reasonable probability of deception, that unfair competition exists. When a purchaser asks for goods of one manufacture, and the vendor presents him, instead, with goods of another manufacture, put up in a package so readily distinguished from the packages in which the goods asked for are usually marketed that the purchaser either knows, or in the exercise of ordi-

nary care ought to know, that the goods he has received are not what he has asked for, then no unlawful substitution or unfair competition has been practiced, but, as said by the Circuit Court of Appeals for the Eighth Circuit in *Walter Baker & Co., vs. Gray*, 192 Fed., 926, the transaction amounts to—

> "a proposition to the purchaser to accept that [the goods offered to him] in lieu of what he asked for."

As said by Mr. Justice Clifford in *McLean vs Fleming*, 96 U. S., 245 (24 L. Ed., 828).

> "A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate one from the other."

And as said by Mr. Justice Jackson in *Columbia Mill Co. vs. Alcorn*, 150 U. S., 464 (37 L. Ed., 1144):

> "Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary purchaser."

It is possible that some out of the many dealers in "Koke" may have been dishonest but the law requires only that each manufacturer so name and dress his product that an ordinary purchaser, exercising ordinary care to ascertain the source of its manufacture, can readily learn that fact by a reasonable examination of its packages, *Coats vs. Merrick Thread Co.*, 140 U. S., 562, 172 Fed., 926; *Centaur vs. Marshall*, 97 Fed., 785; *Allen B. Wrisley Co. vs. Iowa Soap Co.*, 122 Fed., 796, (37 L. Ed., 847); *Coca-Cola Co. vs. Glee-Nol Bottling Co.*, 221 Fed., 61.

SCHEDULE VI.

The Color of the Barrel.

1

DEFENDANTS, AND THEIR PREDECESSORS, HAVE USED BARRELS OF THE SAME COLOR AS THAT THEY NOW USE, SINCE 1888.

J. C. MAYFIELD, Sr., (Rec., 1641-2):

> "I have painted our barrels red because that is the color Dr. Pemberton used, we naturally took over that color, and further, from the fact that it is the cheapest paint you can buy, and one coat is sufficient for painting a barrel. There is no reason why we should change. The cola drink manufacturers paint the barrels and kegs containing their syrups red, except 'Gay-Ola'. In the last year or two I have noticed theirs is a little different color, I have seen one or two possibly, but all the rest are red."

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co., and for 22 years its secretary; also a stockholder in the Pemberton Chemical Co. in 1886 and 1887 (Rec., 357):

> "Yes, sir, from July to October or November, 1887, 'Coca-Cola' was his (Pemberton's) principal product. * * * The thing he was pushing all the time was 'Coca-Cola'. I remember there were very few barrels shipped at that time, but I think *they were the same color as now,—they were painted red.*"

A. O. Murphy, of Barnesville, Ga., the only surviving partner of the old Pemberton Medicine Co., except J. C.

Mayfield, in speaking of the barrels and kegs in which the Pemberton Medicine Co., shipped "Coca-Cola" from January 14th, 1888, to April 14th, 1888, and in which they thereafter shipped "Yum-Yum" and "Koke", said: (Rec., 1284):

> "Those barrels and kegs, to my recollection, were painted *just common red.*"

MISS MARION BLOODWORTH, daughter of E. H. Bloodworth, deceased (who was one of the original partners in the Pemberton Medicine Co.) speaking of the receptacles in which the Pemberton Medicine Co. at first shipped "Coca-Cola", and then, later on, "Koke", said (Rec., 1263):

> "They had little kegs, I should call them, for shipping it out. *They were painted red.*"

STEVE T. MAYFIELD, eldest son of J. C. Mayfield, (Rec., 1457):

> "At that time [1892] I was about nine years old, and I was in school in Atlanta, and on Saturdays I would go down to the place where they were engaged in the manufacture, and I remember on one occasion *I got a lot of red paint on my clothes. I was fooling around the kegs,* and used to get sugar down there and take it home and make candy."

T. C. BANKS, brother-in-law of E. H. Bloodworth, deceased, at whose house in Atlanta Bloodworth resided while connected with the Pemberton Medicine Co., said in speaking of the Pemberton Medicine Co. (Rec., 1409):

> "They did not make 'Coca-Cola' very long. I often went down to their place of business during the time they were making that. They were selling it, shipping it around and selling it to the soda fountains. They put it in small kegs and jugs that I saw. *The kegs were painted red.*"

L. A. HOLLEY, says that in about 1892, (Rec., 1275):

> "I went through his [Mayfield's] place with him. The receptacles, as I remember, were kegs, possibly some jugs. * * * These kegs were painted red."

C. H. CRIMM, an insurance man, who met J. C. Mayfield in Atlanta in 1897, and who had an office next to his in the Norcross Building there, says that at that time Mayfield was manufacturing "Wine of Coca" and two other drinks of a similar nature and color. (Rec., 1040). He says that Mayfield had his manufacturing plant at the corner of Forsythe St. and Trinity Ave., at that time, and that he (Crimm) visited this plant frequently and saw Mayfield engaged in manufacturing these syrups (Rec., 1043-4). He further says (Rec., 1041):

> "I noticed barrels and kegs in his place of business. *The color of those barrels and kegs was red, dark red.*"

GEORGE R EDMONDSON, proprietor of two drug stores in Atlanta, says that he first met J. C. Mayfield about 17 or 18 years ago, in Atlanta,—about 1898 or 1900; that Mayfield at that time was engaged in the manufacture of a soda fountain extract similar to "Coca-Cola"; that he purchased some of that extract from Mayfield for several months before he left Atlanta, and continued to purchase it after Mayfield went to Birming-

ham. (Rec., 1299). In speaking of the receptacles in which the syrup was shipped, he said (Rec., 1299):

> "The syrup came to us in little kegs, possibly five gallon kegs. I think *they were painted red*, that is my recollection."

P. B. McGRAW, a bottler at Gadsden, Ala., says he has been bottling "Koke" ever since 1900 (Rec., 1313), and that (Rec., 1315):

> "The syrup would come to me about 28 gallons, and up as high as 40 and 42 gallons, in a barrel. *These barrels were painted red.*"

C. N. BAKER, a bottler at Newman, Ga., says that he began to bottle "Koke" along in 1900 and something,—it has been a good while ago,"—and that (Rec., 1406):

> "The syrup came to me in kegs, or half barrels, I do not know which now. *The containers of all the colas I ever received were red.*"

J. W. MAYFIELD, son of J. C. Mayfield (Rec., 1518):

> "I went to Birmingham in 1898 or '99. I was in the syrup business then, making 'Koke', 'Celery-Cola', 'Pepsi-Nola', and in the bottling business. I helped my father in that business. I did practically all the bottling, after I learned how, and did a lot of mixing, *painted the kegs*, and acted as shipping clerk. *I painted the kegs red.*"

OLIVER PRINCE (Rec., 1319):

> "I worked for J. C. Mayfield about 1903 and '4, washing bottles, *painting kegs.* * * * That was at

South 20th St., in Birmingham. *I painted the kegs red.*"

G. W. FREEMAN (Rec., 1327):

"I know J. C. Mayfield pretty well, that was 1903, '2, '3 and '4, right along there * * * I knew him on the South side, 20th St., * * * right by the A. B. & A. depot. My place of business was just across the street from him. * * * I had occasion to go across to his place of business a good deal, I was over there frequently. * * * I saw some barrels and kegs over there. It seems to me *they were painted red.*"

MRS. M. L. EDWARDS (Rec., 1336-7):

"I knew J. C. Mayfield. The first bottle of 'Koke' ***that I sold I bought from him in 1903, in East Thomas. At that time he was here in Birmingham. I had a little grocery store with drinks and fruits at that time, at East Thomas, about 3 miles from Birmingham. Mr. Mayfield's place of business was on Morris Ave., between 20th and 21st at that time. * * * I went down to Mr. Mayfield's place of business a number of times. *They had lots of little red kegs around there.*"

A. S. JOSEPH (Rec., 1330-1):

"I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks, and shipping 'Hop Ale'. * * * I had occasion to go to Mr. Mayfield's place of business frequently * * * owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of one hundred packages, of 'Hop Ale', delivering it, and, later, collecting on it. * * * I noticed a good many receptacles sitting around in his place of business when I was in there. *His packages were painted red.* * * * Mr. Mayfield con-

tinued manufacturing and selling that product 'Koke' during the time that I knew him, from 1900 to 1907, when the brewery went out of commission."

W. B. ARNOLD (Rec., 1308):

"I knew J. C. Mayfield, first knew him the latter part of 1905 down here on Morris Ave., Birmingham, Ala. He was engaged in the bottling business at that time, manufacturing 'Koke' and different drinks. * * * I went into the place where he was making this stuff; into his factory down on Morris Ave. *I saw the syrup in barrels painted red.* * * * In 1908 and 1909 I ran a soda fountain in the Hippodrome skating rink on Third Ave. 'Koke' was the only cola drink I dispensed. * * * It came to me in little red barrels, 5 gallon and 10 gallon barrels. *They were painted red.*"

CHARLES W. BURTON (Rec., 1324):

"He [J. C. Mayfield] was in business then (1906-7) on Morris Ave., between 21st and 22nd, here in Birmingham. I have been to his place of business frequently. I have seen him put up his syrup; seen him have little kegs sitting around there, *little red kegs.*"

E. D. MONTGOMERY (Rec., 1356-57):

"I know J. C. Mayfield. I knew him here in Birmingham. * * * I was with him in 1908 in business, in his employ in 1908. I was what you could call, I reckon, a general man around the plant, in the shipping department, filling orders, and one thing and another, bottling. Mr. Mayfield was making several different drinks. * * * He shipped syrup out to the trade. He shipped it in bottles and also in kegs. *The kegs were generally painted red.*"

A. F. WATKINS (Rec., 1377):

"I knew J. C. Mayfield. First met him right here in the city of Birmingham. He was engaged in the bottling business, manufacturing syrups. * * * I was over to his place of business quite a good deal. I saw barrels, kegs, and stuff of that kind. *They were painted red.*"

2

PRACTICALLY ALL THE OTHER COLA SYRUPS ARE MARKETED IN BARRELS PAINTED THE SAME COLOR AS PLAINTIFF'S AND DEFENDANTS' BARRELS.

(a).—Testimony of Defendants' Witnesses.

LEE HAGAN, of the Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1293):

"The barrels and kegs we ship our product in are painted red. I believe we have always used red paint. We had to paint them some color, and that is about as cheap a paint as you can buy. It is the most durable and attractive."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola", Nashville (Rec., 1090-1, 1098):

"In shipping my syrup, we ship it in barrels and kegs. They are usually red. * * * We paint our barrels that color because, in the first place, it is cheaper, I reckon, and, in the second place, the color of the barrels that nearly all syrups are sold in red barrels. All syrups I have seen on the market, except 'Gay-Ola'. I think probably they had to change their barrels' color on account of some court decision (Rec., 1090-1091). * * * I would not know a 'Coca-Cola' barrel by the red color. I did not

know that the Coca-Cola Co. specifically had a patent or trade-mark on the color of their barrels. I never had heard of it. I buy the cheapest paint I can get." (Rec., 1098).

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks and manufacturers of "Star Cola", Nashville (Rec., 1084, 1088):

"We have shipped syrups in red barrels. When we were doing all of our own painting we painted them red because red paint was the cheapest. We get 'Digestol' and other drinks, 'Jersey Creme', and things like that, frequently in red barrels. I would know a 'Coca-Cola' barrel by the *head*, they have a *large paper label* that they paste on the head of a barrel, but I would not know a 'Coca-Cola' barrel by its *color*. * * * If there was *no label* on the barrel, I could not tell the 'Coca-Cola' barrel from any other barrel. (Rec., 1084). * * * Red paint was less expensive than any other kind, that was our experience. * * * The painter told us that red paint was the cheapest at the time." (Rec., 1088).

J. M. WARREN, president of the Warren Paint & Color Co., Nashville (Rec., 1166-9):

"I have sold paint to the Koke Companies. * * * I have sold them red barrel paint. This paint I sold them has no particular name, only it is a standard red, universally used by all concerns who have use for paint on barrels and packages of that sort. It is the cheapest paint you can buy, because the ingredients that go to make it up are the cheapest. Red oxide of iron, and, of course, oil. That has been a standard paint ever since I can remember, oh, 18 years. That paint has been used mostly for painting barrels, and cooperage, and things of that kind. I sell it to all classes and trades, any one that uses

packages and barrels, we sell that paint to. I should judge 75 per cent of all paint that is used for barrels is red, because it gives you more universal satisfaction and is cheaper paint. There is a paint known as 'Coca-Cola Red'. 'Coca-Cola Red' is a very expensive red, used mostly, from my knowledge, in painting *signs, bulletin boards, things like that.* We have matched some paint called 'Coca-Cola Red' sold to the local *sign men* here in town doing *sign work* for the Coca-Cola Co. This 'Coca-Cola Red' is a more expensive paint than this other one, because it is a very durable red, a brighter shade, and a special shade. There is no comparison at all between the red paint I sell the Koke Companies compared with the color of 'Coca-Cola Red'. One is a very bright vermillion, and the other is a mineral paint; one is a manufactured article, and the other a mineral dug out of the ground. The high priced or 'Coca-Cola Red' is a manufactured and chemical paint. The colors are made from chemicals. A barrel painted 'Coca-Cola Red' and another of the cheaper grade would look entirely different, you could distinguish them in a minute. 'Coca-Cola Red', as I know it, is a very bright shade of vermillion, and the other is what we call 'English Venetian Red', very much darker shade. * * * 'Coca-Cola Red' is a true shade, has a good rich tone to it, whereas the other has a muddy color. * * * The 'Coca-Cola' people use on their *barrels* the regular *standard 'English Venetion' paint.* They do not buy from us, but it is the same kind of red, universal paint we all use, all manufacturers use, they look alike, and I could not tell the difference between them. They *do not* use *'Coca-Cola Red'* on the *barrels* to my knowledge. [Compare, for instance, the color of *Defendants' Exhibits 278 and 279*, two Coca-Cola kegs, with the color of *Plaintiff's Exhibit 17*, an enameled metal sign board used in advertising "Coca-Cola".] * * * Our representative called on the Central Koke Co. at Chattanooga and in the conversation told him what kind of paint we had,

etc., and he bought five gallons to try. Nothing whatever was said about the *shade*, he just bought five gallons of our *standard red barrel paint*, and we sent it to him, and since that time have been getting the orders. The *price* was the reason he bought from us, probably. I think it was *cheaper* than the paint he had bought before."

W. M. POLLOCK, proprietor of the Nashville Bottling Works, Nashville, Tenn., and bottler of "Fletcher's Cola" (Rec., 1199):

"I have bottled other cola drinks. I have bottled 'Coca-Nola', 'Rye-Ola', 'Gay-Ola', 'My-Ola', 'Star-Cola', and bottled other drinks. * * * The color of the [illegible]rels I get the cola drinks in I am now bottling are red. I have gotten different cola drinks in red barrels. 'Gay-Ola' was in red barrels when we bottled it, if I am not mistaken. 'Coca-Nola' was in red barrels, I am quite sure. Diehl's 'Star-Cola' is in red barrels. Almost all cola drinks I have bottled come in red barrels."

C. N. BAKER, bottler of soft drinks, Newman, Ga. (Rec., 1406-7):

"I could not name all the different colas I have bottled. * * * The containers of all the colas I ever received were red. * * * The syrups for all these different drinks came in barrels and kegs. They were painted red."

C. J. THORNTON, proprietor of the Corner Drug Store, Hattiesburg, Miss.:

"I have sold 'Afri-Cola', 'Coca-Cola', 'Dope', 'Ko-Nut', 'Luck-Ola'. (Rec., 1759). * * * These various cola syrups come in red barrels and kegs. I never got a syrup or an extract for a cola beverage that did not come in a red barrel or keg." (Rec., 1760).

DR. H. O. NULL, a practicing physician and retail druggist, Chattanooga (Rec., 1063):

> "The syrup for the different cola drinks come in just ordinary barrels, so far as I have noticed them, all painted red. I do not believe I could tell a 'Coca-Cola' barrel, by its *color*, if I did not see the *label* on the barrel. * * * I do not think I could distinguish it, by its *color*, from the barrels in which other syrups have been shipped. I do not think there is any distinction in them."

A. W. STANLEY, proprietor of the Stag Hotel and Bar, Chattanooga (Rec., 1004-5):

> "I do not know as I could tell a 'Coca-Cola' barrel if I saw it, because a great many other barrels are the same color. * * * We used to get Catawba wine in red barrels, painted red, you know."

A. F. ENSINGER, bartender, Chattanooga (Rec., 986):

> "I would not know a 'Coca-Cola' barrel if I saw it, *unless it was labeled*. I used 'Coca-Cola' barrels for about five or six years, and I did not see any difference in the barrel from that of any barrel, *unless there was a label on it*. * * * I could not tell any difference in the *color*."

F. M. BOGART, a drug clerk and soda dispenser, Chattanooga (Rec., 1070):

> "We serve 'Coca-Cola', 'Ko-Nut', 'Afri-Cola' and 'Mays-Ola'. The syrups for the different drinks come in barrels. The color of the barrels are red. * * * I do not know as I could tell a 'Coca-Cola' barrel from the other barrels, if I could not see the *label* on it, by its *color*."

WILLIAM F. DAVIS, president of the Davis-Fuston Drug Stores, Nashville (Rec., 1103):

> "These different cola drinks we buy sometimes in barrel lots, some times in half barrels, and occasionally in five gallon containers. The color of the barrels the different drinks come in is a muddy, reddish color."

PAUL E. WEBB, soda dispenser, United Cigar Stores, Nashville (Rec., 1119-20):

> "I have dispensed 'Fletcher's Cola', Diehl's 'Star-Cola', and some other names. I do not remember the names of them. I am dispensing now 'Coca-Cola' only. I have dispensed other cola drinks in addition to 'Coca-Cola' at various other places I have worked. * * * Other cola syrups come in red barrels."

J. C. PRICE, proprietor of a restaurant, but formerly a soda dispenser, Nashville (Rec., 1205-1207-8):

> "There are many different brands of cola drinks I have served. I could not call them all, I know a few: 'Arrow-Cola', 'J. D. F. Cola', 'Koke', and 'Cola', 'Gay-Ola', 'Afri-Cola' * * * 'Star-Cola', and 'Gersts' Cola', too, and 'Coca-Cola'. (Rec., 1205). * * * These various drinks I have referred to most all came in red barrels. The Coca-Cola Co. had a barrel that was very close to it, the paint was. * * * I do not think I could tell the difference just at a glance." (Rec., 1207-8).

H. F. CRISLER, retail druggist, Jackson, Miss. (Rec. 1430):

> "The only three syrups I have handled were 'Ko-Nut', 'Dope', and 'Coca-Cola'. They all came in red barrels."

HENRY BOERGER, proprietor of the Chattanooga Bottling Works, Chattanooga, Tenn. (Rec., 969):

> "The color of the barrel the 'Gay-Ola' syrup came to me in was red. I think the color of the barrel the 'Star-Cola' came to me in was red."

R. F. ZIMMERMAN, proprietor of the Union Bottling Works, Chattanooga, which bottles "Tru-Cola" (Rec., 981):

> "We get the syrup ['Tru-Cola'] from the National Syrup Co., then we bottle it. It comes in a kind of reddish barrel, supposed to be red, I think."

BURTON JONES, a retail druggist, Chattanooga (Rec., 1006):

> "We get 'Tru-Cola' in a red barrel, the syrup comes in red barrels."

C. P. EMBREY, a retail druggist, Chattanooga (Rec. 1019-20):

> "[The] cola syrups I have handled come in red barrels. * * * I could not tell a Coca-Cola' barrel if I saw it *and did not see the label* on the end of it, because they are all colored red, about the same thing."

J. M. WHEELER, a bartender, Chattanooga (Rec., 972):

> "I would not know a 'Coca-Cola' barrel if I saw it, unless there was *letering* on it."

R. L. WAYMAN, a bartender, Chattanooga (Rec., 1016):

"I would not know a 'Coca-Cola' barrel if I saw it. All I would go by would be the *name on* it."

R. K. SMITH, head dispenser at the United Cigar Stores Co., Nashville (Rec., 1190):

"I could tell a 'Coca-Cola' barrel, *if it was labeled 'Coca-Cola'*. * * * I have not seen the wagons delivering syrups to the soda fountains around town. It is not customary in this city for soda fountain people to leave their empties sitting out on the sidewalk in front of their places."

M. J. COSTELLO, a bartender, Chattanooga (Rec., 1000):

"I have not noticed barrels of 'Coca-Cola' sitting on the sidewalk in front of soda stands around town."

(b).—Admissions of Plaintiff's Witnesses.

FREDERICK CONWAY PEACE, an ex-Pinkerton detective, employed by the Coca-Cola Co. to help work up this case (Rec., 2213-16):

"Yes, sir, I have gone around investigating the barrels at different soda fountains to see what dealers were handling. You asked me how many different kinds of cola drinks I have discovered in barrels at the different soda fountains I have been to; why, 'Ko-Nut', and 'My-Coca' are the two principal ones, 'X-O', that is another substitute for 'Coca-Cola'. I understand it is made in Baltimore, or some place in Virginia. * * * I am very familiar with the 'Ko-Nut' barrels and 'Koke' barrels. * * * I notice all the barrels particularly, but these are the most prominent ones. I have seen barrels in which 'My-Coca', 'Wise-Ola', and 'Rye-Ola' is shipped, and I was able to tell the difference between these various

barrels and 'Coca-Cola' barrels *because 'Coca-Cola' barrels were always labeled 'Coca-Cola'*—great big labels on either end. (Rec., 2213). *That is the only way I could tell the difference between them.* * * * 'Wise-Ola' barrels and the barrels used by the Southern Koke Co. are the same color practically speaking, as the 'Coca-Cola' barrels, and so are the 'My-Coca' barrels, but the 'My-Coca' barrels bear a great big label, almost as large as the 'Coca-Cola' labels. All I ever saw of them were labeled 'My-Coca'. (Rec., 2214). * * * Yes, sir, I have seen 'Koke' barrels in railroad stations. You ask if I recognized them right off as 'Koke' barrels; * * * I could not tell whether they were '*Koke*' barrels or whether they were *some other kind of syrup barrels.* I recognized them as *syrup* barrels. They *looked like the standard syrup barrels used for syrups.*" (Rec., 2215-2216).

HOKE SMITH LEIGH, a traveling salesman in the employ of the Coca-Cola Co. (Rec., 2235-6):

"No, sir, I could not tell by looking at the barrel I thumped—the substitute barrel— what kind of barrel it was, because I do not recall that it had any *label on it.* You ask if it requires a *label* to distinguish the barrels one from the other in my mind; well, if there is any doubt. You ask if there is ever any room for doubt, and if I ever ran across an occasion to doubt, except from seeing the *labels*, or the absence of it; I see a lot of red barrels that do not have labels and I always doubt it right away. You ask if I could tell the difference in the barrels, except by the *labels* on them; I generally know. The boys in the factory mark them with a black mark, and I sometimes distinguish them *that way*, but *I look to the label more than anything else...* You ask if, aside from the *marks* and *labels*, there is any way to distinguish one from the other; I do not know. * * * When in doubt it will be settled in my mind

by the 'Coca-Cola' label. You ask if I can distinguish the *color* of the 'Coca-Cola' barrel from all these other barrels; I did not say necessarily it could be done. * * * You ask if I could tell, just by looking at the barrel, *without seeing the label; not to get right down to the point of distinguishing one from the other.* * * * All these substitute barrels look just about alike, all I have seen or noticed mostly. It is pretty hard to tell one of those from the others." (Rec., 2235-2236).

CLAUDE W. HICKEL, drug clerk, Charleston, West Virginia, but formerly a soda dispenser in Ocalla, Florida (Rec., 2062-3):

"The way I distinguish the 'Coca-Cola' barrels from those other barrels I have mentioned is because they always *label* them. (Rec., 2062). * * * The *only difference* in my mind between the barrels I have seen these *other* drinks I have mentioned come in, and the *'Coca-Cola' barrels*, is that the 'Coca-Cola' barrels that came to the Post Office Drug Store were all *labeled*—they had big labels on the head of the barrel. Why, yes, *that was the only way I could tell the difference between the 'Coca-Cola' barrel and the barrels containing these other drinks*,—they were very similar." (Rec., 2063.)

CHARLES KINGSBURY (Rec., 466):

"The way I distinguish a 'Coca-Cola' keg is that *it has a great big name on the end of it*,—'Coca-Cola'. No, I don't know that I could distinguish it *in any other way*, or that I could distinguish it by its *color*. * * * The reason why I know it when I see it is *because it has 'Coca-Cola' on it.*"

GEORGE J. MARTIN, traveling salesman for the Coca-Cola Co. (Rec., 344):

"Yes, I have noticed the kinds of barrels that 'Ko-Nut', and 'Afri-Cola' are shipped in—in fact, it is just as near an imitation of the 'Coca-Cola' barrel as your eye could see,—a red barrel, minus the label. Yes, I have seen other so-called cola beverages, or caffeine-containing soda fountain beverages, shipped in barrels of the same color as 'Coca-Cola'."

J. F. REDDING, a retail druggist, Atlanta, Ga. (Rec. 480):

"Yes, sir, I have seen red barrels, other than Coca-Cola' barrels. I do not recollect where I have seen them, but I have seen red barrels, though."

ASA G. CANDLER, president of the Coca-Cola Co. (Rec., 383-4):

"Oh, yes, there is a drink called 'Afri-Cola'. I have heard of it frequently. Yes, sir, I think I have seen it,—I know I have. * * * It is sold in barrels whenever they can. (Rec., 383.) * * * Yes, sir, there is a 'Ko-Nut',—that's run by the same gang, I think. * * * Yes, sir, I think that is sold in red barrels, too,—the only way I know. I see red barrels traveling around town * * * and they tell me it is 'Afri-Cola'." (Rec., 384).

SCHEDULE VII.

The Color and Taste of the Drink.

1.

Caramel Coloring.

(a).—Testimony of Defendants' Witnesses.

J. A. BERMUDEZ, a chemist, New Orleans. (Rec., 1496):

> "I have known of the caramel coloring ever since I have been in the drug business, that is about 1876 or '77. I was with, in 1876 or '77, P. L. Quisacks, 37 Royal Street, who used caramel at that time for all soda fountain syrups. Mostly all soda fountain syrups are colored with caramel, take sarsaparilla, vanilla, banana."

ADAM DIEHL, who has bottled soft drinks for 47 years and who now manufactures "Star-Cola", Nashville. (Rec., 1088):

> "Caramel coloring is the least injurious, and that is the reason we use caramel coloring. It is sugar."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola", Nashville. (Rec., 1091-2):

> "We color our drink with caramel. It is cheaper than anything else and it is permitted under the law under all of the States without having to put 'Artificially colored.' It is not a deleterious coloring at all, and it makes a beautiful red colored drink. * * * I do not know of anything else that would take the place of caramel coloring. My chemist that I had

with me for several years never used anything else.

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola", Atlanta. (Rec., 1292):

> "I color our product with caramel coloring. Caramel coloring is cheapest. * * * It is of vegetable origin and stands the acids better than anything we can get."

(b).—Admissions of Plaintiff's Witnesses.

DR. JOHN A. WESENER, Chicago. (Rec., 926):

> "Caramel has been in use as a coloring matter for beverages, oh, for a long time, a great many years. I should say it was used prior to the Civil War. Yes, it is now a uniform coloring matter which is used extensively in coloring all kinds of drinks. It is one of the oldest coloring matters on the market and is perfectly harmless."

DR. WILLIAM P. HEATH, of the Pratt Laboratory, Atlanta. (Rec., 417):

> "Caramel coloring has been in use a long time. It has been in universal use for coloring all kinds of beverages, not only soda water drinks, but whiskies, wines and beer and flavoring extracts as long as I can remember. * * * It is the most universally used coloring among the food products. * * * It is absolutely harmless as a coloring matter."

DAVE S. BAUER, a retail druggist, Mobile. (Rec., 544):

> "Caramel is recognized as a standard brown coloring matter for syrups, and is in universal use, and was in such universal use when I was a boy. I

am 42 years of age and caramel has been used as a coloring for syrups ever since I can remember by every druggist that I have come in contact with."

F. M. GREEN, a retail druggist, Atlanta. (Rec., 454):

"Caramel was used at that time (1888 and prior thereto) almost universally as a coloring matter for drinks that we wanted to color a brown color. That is the only thing they could color them with and get by with it. I mean by that that caramel would not make a muddy precipitate and things of that kind. Other coloring matter would make a muddy precipitate."

I. L. JAMES, a retail druggist, Atlanta. (Rec., 461):

"I have made root beer myself. * * * We colored it with burnt sugar,—caramel. * * * That material has been in universal use for coloring beverages, and we have used it to color vanilla flavoring."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 379):

"Yes, sir, I think I did handle burnt sugar or caramel coloring. Now, I made many a batch of caramel coloring. * * * In those days [prior to 1886] it was used in the drug business. * * * Yes, I said caramel is a standard coloring matter."

2.

Soda Fountain Beverages Same Color as Coca-Cola That Preceded It In the Market.

(a).—Testimony of Defendants' Witnesses.

ADAM DIEHL, who has bottled soda water for 47

years and who now manufactures "Star-Cola", Nashville (Rec., 1082-3):

> "We have been bottling soda water for 47 years. * * * We have been putting out those drinks,—sarsaparilla and root beer, for 47 years and both have been the same color all that time. * * * The color of these drinks is caramel color, the same color as 'Coca-Cola'. We color those drinks with burnt sugar coloring, caramel coloring."

J. A. BERMUDEZ, a chemist, New Orleans (Rec., 1496):

> "Quisacks got out a beverage which is sold through the fountain as 'Mead'. That is put out by McClasky. That has been on the market here a long time prior to 1877. * * * It is colored with caramel. It cannot be colored with anything else because at that time aniline dies were not known."

PATRICK J. GILLIAN, President of the Crescent City Seltz & Mineral Water Co., New Orleans (Rec., 1501-2):

> "The name of our concern is the Crescent City Seltzer & Mineral Waters Co. I have been connected with that concern since '76. * * * I know that all the time in the Crescent City Seltzer & Mineral Waters Co. we bottled sarsaparilla. * * * We colored sarsaparilla with sugar coloring, caramel coloring, sarsaparilla coloring should be the same color all the time. * * * It is supposed to be always the same color. I have seen Coca-Cola. It is pretty much the same [color] as the sarsaparilla we made. I have heard that they made sarsaparilla in 1847, that was the first factory that was put up here, but I wasn't in the business at that time. Some of the other beverages that have been colored with

caramel coloring since 1868, well, most any of the colored drinks, they are colored with it, I think."

TOM COLLINS, bartender, Chattanooga (Rec., 988):

"I have known of the product Root Beer and Sarsaparilla ever since I have been in Chattanooga, about 28 years. The color of sarsaparilla and root beer is about the same as Coca-Cola."

JOE QUINN, bartender, Chattanooga (Rec., pp. 991-2):

"I am 40 years old. * * * I have handled root beer and sarsaparilla, have known these two drinks all my life. * * * They all have that dark color. I should say between a brownish and black color. * * * I can not distinguish a glass of Coca-Cola from a glass of root beer by the color."

E. W. FREEMAN, bartender, Chattanooga (Rec., 975-978):

"I also handled in my place of business sarsaparilla or root beer. * * * I have known of those drinks for years (Rec., 975). * * * I have heard of and handled root beer and sarsaparilla all the time I have heard of and handled Coca-Cola. * * * I knew of those two drinks, sarsaparilla and root beer, before I heard of Coca-Cola. They were the same color at that time as now." (Rec., 978).

F. E. HOOPER, a retail grocer, Chattanooga (Rec., 999):

"Root beer has been on the market a great many years."

A. W. STANLEY, proprietor of the Stag Hotel and Bar, Chattanooga (Rec., 1004):

> "I have handled Sarsaparilla and Root Beer. How long I could not tell, it has been a great many years, though, sarsaparilla. The color of those drinks compared with the color of Coca-Cola, I guess about the same color."

(b).—Admissions of Plaintiff's Witnesses.)

C. G. PETERS, a retail druggist for 28 years, New Orleans (Rec., 655):

> "I have handled a lot of these drinks like root beer and sarsaparilla. The coloring matter in root beer is burnt sugar, what we call caramel. The coloring of sarsaparilla, and root beer, and Coca-Cola, is very much alike. There is no distinction to the ordinary eye. I have been handling sarsaparilla and root beer for 28 years. I was handling it before I ever handled 'Coca-Cola',—before I ever heard of 'Coca-Cola'."

DAVE S. BAUER, a retail druggist, Mobile (Rec., 543-4):

> "I have been in the drug business between 24 and 25 years, during which time I have been dispensing at my soda fountain root beer and sarsaparilla and drinks of that kind. Sarsaparilla has been on the market to my knowledge since I have been in the drug business and longer, as long as the United States Pharmacopoeia has been in existence. I should say it has been in existence 50 years, if not longer. The color of the soda fountain sarsaparilla syrup during this time has varied according to the strength used by each particular dealer. I might make my sarsaparilla syrup thicker than anybody

else, and mine of course would have a darker color; however, it has all had the same general color, which is brown. I have made sarsaparilla myself, and have colored it with burnt sugar or caramel coloring. Yes, sir; as long as I have known sarsaparilla syrup as a soda fountain beverage it has been colored with caramel coloring. Yes, sir; I have also handled root beer for the same number of years. It has been known longer than I have been in business. It has always had that same dark brown color. * * * In general coloring they [Coca-Cola and sarsaparilla] are alike,—as a matter of fact, both of them have a dark brown color, and so has root beer."

I. L. JAMES, a retail druggist, Atlanta (Rec., 461-2):

"You ask what other drinks are on the market that are similar to 'Coca-Cola' in color; well, root beer resembles 'Coca-Cola', foams a little more, and sarsaparilla,—of course, sarsaparilla and root beer are similar. * * * I do not know what is the difference in color between a glass of root beer or sarsaparilla as served at a soda fountain and a glass of Coca-Cola. Coca-Cola might be a shade lighter, I don't know. Yes, sir; it is very hard to tell the difference. I don't think the ordinary customer coming in, if he saw a glass of one and a glass of the other sitting on the counter could tell the difference between them."

F. M. GREEN, a retail druggist for 22 years, Atlanta (Rec., 453-4):

"Root beer and sarsaparilla are colored with caramel. I remember seeing sarsaparilla on the fountain ever since I was a small boy. I am now 42 years of age. I have seen it since I was about 10 years old anyway,—that is to say, I have seen it on the

> market for 32 years and it has been substantially the same color during all of that time that it is today. * * * I have made sarsaparilla and root beer myself way back there years ago and I used caramel to color it. * * * I have seen 'Moxie' and that is a deep brown color. * * * It is along the same kind of color [as Coca-Cola]. * * * I have seen 'Moxie' on the market [since] about 1888."

W. L. SAMS, one of plaintiff's traveling salesmen Rec., 337):

> "I have seen root beer when I was 10 years old that had the same color it has today. * * * I have seen sarsaparilla during the time I have been in business of the same color it is today. Yes, sir, I have seen 'Moxie' and it is similar in color to root beer and sarsaparilla."

ALEXANDER CRUIKSHANK, proprietor of cigar store and soda fountain, Atlanta (Rec., 465):

> " 'Moxie' is a soda fountain beverage."

F. C. PEACE, one of plaintiff's detectives, says he has seen "Moxie" and that it is similar in color to "Coca-Cola". (Rec., 2205-6).

DR. JOHN A. WESENER, a chemist, Chicago (Rec. 926):

> "Yes, sir, I think that root beer, sarsaparilla and 'Moxie' and drinks of that character, were on the market and sold prior to 1886. I could not say as to whether they were colored with caramel at that time, because I never made any tests at that time, but caramel could have produced the color that they had."

WILLIS E. VENABLE, former manufacturer of "Coca-Cola", and a soda fountain proprietor since 1867 (Rec., 390-1):

> "I sold root beer at that time [1887], certainly, vanilla, lemon, strawberry, sarsaparilla, and probably 50 other different drinks that somebody got out. * * * I cannot remember whether I had been selling this root beer, and sarsaparilla, and such things, before I heard of Coca-Cola. I don't think I had ever sold any root beer before that, but I sold sarsaparilla. I don't remember whether sarsaparilla was at that time about the same color it is now. I suppose it was, that is all made about the same color, I think, about, as well as I remember.

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 378-9):

> "You ask if in my drug business from 1884 to 1887 I handled any other beverages. * * * We sold liquor and I do not know really what we did sell. * * * We had a syrup called sarsaparilla and we put it in the soda fountain. * * * I don't remember that we made it, we may have, anybody made it so far as I know,—sarsaparilla syrup. * * * The color of that sarsaparilla syrup was brown, I think. * * * Yes, I think it was a dark reddish brown."

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co. (Rec., 358) and for 22 years its Secretary (Rec., 353), when asked if there were any other soda fountain beverages of the same color as Coca-Cola at and prior to the time Coca-Cola was first introduced, replied, "I expect there was." (Rec., 361).

In *Chas. E. Hires Co. v. Consumers Co.*, 100 Fed., 809 (C. C. A.-7), it was said that the predecessors of the

Chas. E. Hires Company began to make what has since become known as 'Hires' Root Beer", in 1877.

In *Moxie Nerve Food Co. v. Maddox*, 152 Fed., 494, it was said that "Moxie" was first placed in the market early in 1885 and that it was a beverage "resembling in color the usual extract of vanilla."

3.

DEFENDANTS AND THEIR PREDECESSORS HAVE MADE AND SOLD SOFT DRINKS EXACTLY LIKE PLAINTIFF'S IN COLOR AND TASTE, SINCE 1888.

(a).—The cola drink known as "Koke".

A. O. MURPHY, of Barnesville, Ga., says that, when the Pemberton Medicine Co. was formed on January 14th, 1888 (Rec., 1287; *defendants' exhibit 22*), Dr. Pemberton conveyed to it the "Coca-Cola" formula and business (Rec., 1280) and that thereafter the partnership manufactured and sold "Coca-Cola" (Rec., 1282). He says:

> "The color of that syrup was identical with the color of 'Coca-Cola' syrup today, and about the same in taste. * * *. The color and taste of that product we were manufacturing then under the name of 'Coca-Cola' was the same, as far as I can see, as that now manufactured by the Koke Company and called 'Koke'." (Rec., 1282).

Later they changed the name of their "Coca-Cola" to "Yum-Yum", but the product itself remained the same. (Rec., 1283).

T. C. BANKS, of Newman, Ga., but formerly of At-

lanta, the brother-in-law of E. H. Bloodworth, deceased, at whose home Bloodworth lived while in Atlanta (Rec., 1408-9), says that the "Coca-Cola" which the Pemberton Medicine Co. manufactured and sold in 1888 "was a dark mahogany. * * * It tasted like the "Coca-Cola" you get now,—practically the same taste (Rec., 1409). He says that later, after the Pemberton Medicine Co. changed the name of its product from "Coca-Cola" to "Koke", the product itself remained the same. "If there was any difference between this preparation they called 'Koke' and the preparation called 'Coca-Cola', I could not tell it from drinking it and looking at it. It appeared to be the same. It was supposed to be practically the same product, I think, under a different name." (Rec., 1410).

MISS MARION BLOODWORTH, daughter of E. H. Bloodworth, deceased, says, in speaking of the Pemberton Medicine Co., in which her father was a partner (Rec., 1262):

> "I used to go down to the place of business every few days. I drank that 'Coca-Cola' they were making. They were making a dark brown red syrup. It tasted like 'Coca-Cola' tastes now and it looked like 'Coca-Cola' (Rec., 1262-3). * * * They made this 'Coca-Cola' three or four months, then they still made it and called it 'Koke'. (Rec., 1263). * * * My father and Mr. Mayfield continued, after Mr. Murphy sold out, for several years, I think it was four or five or six years. All that time they continued to manufacture and sell this product 'Koke'." (Rec., 1267).

J. C. MAYFIELD says that, after Pemberton transferred the "Coca-Cola" business to the Pemberton Medi-

cine Co. in January, 1888 (Rec., 1607), "we continued to manufacture and sell 'Coca-Cola' syrup under that name for two or three months." (Rec., 1610). Then they changed the name to "Koke". (Rec., 1612-13). "The product was no different from the product 'Coca-Cola',—there was no difference between the product which we thereafter labeled 'Koke', and 'Coca-Cola'. We continued to manufacture 'Koke' by the same formula that old Dr. Pemberton turned over to us as the 'Coca-Cola' formula." (Rec., 1614).

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 382):

> "After this transfer April 14th, 1888 * * * they * * * operated the Pemberton Medicine Co., that is it, yes. That company's business was manufacturing 'Wine of Coca', and they undertook to manufacture, it was a hair dye, and they had 'Globe Flower Cough Syrup' and 'Compound Stillinga' and shortly after I bought 'Coca-Cola' they started out manufacturing a soda fountain drink which was as near like 'Coca-Cola' in color as they could get it,—that is, a man named Mayfield that was connected with that company,—he called it 'Yum-Yum'. * * * I am not certain whether that was manufactured by the Pemberton Co. or by J. C. Mayfield,—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. * * * I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that is right, they were connected with the Pemberton Medicine Co. * * * These people, Mayfield, Bloodworth and Murphy, were running the Pemberton Medicine Co. for awhile,—I don't think they ran it long,—and they were manufacturing a drink similar to 'Coca-Cola' at that time." (Rec., 382-83).

F. M. ROBINSON, a stockholder and director of the Coca-Cola Co. and formerly Secretary thereof (Rec., 359-360, 364-5):

"As to the associates whom Dr. Pemberton had in the Pemberton Medicine Co., I just remember that a man by the name of Mayfield was one of them and a Mr. Bloodworth was another one,—I don't remember his name now,—Murphy, I guess it was (Rec., 360). * * * They did a medicine and extract business. They manufactured these articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks, —colas,—to some extent. (Rec., 359). * * * The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. * * * I don't know anything about the quantities they manufactured or sold, but I know just as well as I know that Hagan & Dodd manufacture 'Ko-Nut', but I don't know anything about the extent of it." (Rec., 364-365).

J. C. MAYFIELD:

"After the retirement of Murphy in June, 1888, *(defendants' exhibit 22)* and the death of Dr. Pemberton that same summer, Mr. Bloodworth and I continued to manufacture and sell 'Koke' until 1895. * * * Then I bought out Mr. Bloodworth (Rec., 1615). * * * After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Co. of America, (Rec., 1616) whereupon I sold the Koke Co. of Americ all my interests in everything I had in the 'Koke business. * * * The Koke Co. of America has contin' ously owned the 'Koke' business and the trade-mark Koke from its organization down to date. (Rec., 1617). * * * This product 'Koke' has always been the same color from the time we began to make it up to the present time,

and had the same taste substantially." (Rec., 1628).

L. A. HOLLEY, formerly of Roanoke, Ala., but now of Atlanta, Ga., visited J. C. Mayfield at his place of business in Atlanta in 1895 or '96 (Rec., 1274). He says:

> "He was manufacturing some drink at that time. * * * I drank some of it. * * * It tasted something like 'Coca-Cola', it seemed something about the same color as 'Coca-Cola', a kind of dark brown color." (Rec., 1275).

H. C. GROVES, a retail druggist for 30 years, Ocala, Fla. (Rec., 1212-13):

> "I know J. C. Mayfield. I knew him when I was manager of the store in the spring of '88. I first met him at my store in Ocala, Florida. * * * He was soliciting for cola drinks at that time, trying to sell me cola drinks. The name of that drink was 'Koke', 'K-o-k-e'. * * * The color of that syrup was a dark brownish. I have seen 'Coca-Cola' syrup. I judge they are just the same, this 'Koke' and 'Coca-Cola'. I made a drink of it and drank it. * * * It tasted * * * something very similar to the taste of 'Coca-Cola'. I bought some of it at that time. * * * He sent me more after that and I have continued to handle it up to date, continuously from that time up to date." (Rec., 1212-13).

GEORGE R. EDMONDSON, proprietor of two drug stores, Atlanta (Rec., 1299):

> "I know J. C. Mayfield. I first met him, I guess, in '98 or 1900, it has been quite a long time ago. When I first met Mr. Mayfield he was here engaged in the manufacture of a soda fountain extract. We bought some extract from him; we bought some of

it, I guess, from time to time five or eight months before he left Atlanta, and he went from Atlanta to Birmingham and we got some after he left Atlanta. * * * It was very similar to 'Coca-Cola' in color; we served it like 'Coca-Cola' in seven ounce glasses."

P. B. McGRAW, a soda water bottler, Gadsden, Ala. (Rec., 1313-14):

"I have been bottling 'Koke' ever since 1900 off and on. I purchased it as an extract from J. C. Mayfield right here in Birmingham. * * * Sarsaparilla and 'Koke' are very near the same color."

R. J. BAKER, in the advertising business in Birmingham (Rec., 1302):

"Mayfield, in 1902, when I knew him, was bottling 'Koke' over there in his place of business at 2116 Morris Avenue. I knew him in a business way a good many years. * * * I used to have to go to his place of business to collect on Saturdays. * * * and he would give me a drink of his 'Koke'. It was * * * a syrup just like 'Coca-Cola', red like it, tasted like it."

A. S. JOSEPH, of the Alabama Brewing Co., Birmingham (Rec., 1330):

"I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks and shipping 'Hop Ale' then. * * * Owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of a hundred packages of 'Hop Ale', delivering it and later collecting on it, which brought me to his place of business sometimes twice a day for a week. * * * I remember he was manufactur-

ing 'Celery-Cola' and 'Koke'. This 'Koke' was a soft drink. It was about the color of all soft drinks. It seems to me the appearance was about on a par with 'Coca-Cola' and those cola preparations."

E. D. MONTGOMERY, formerly shipping clerk for J. C. Mayfield, Birmingham (Rec., 1356-7, 1363):

"I know J. C. Mayfield. * * * I was with him in 1908 in business, in his employ in 1908. * * * He was making several different drinks. * * * 'Celery-Cola', 'Pepsi-Cola', * * * 'Creme' and 'Koke'. Rec., 1356-57). * * * This stuff 'Koke' that was made down here where I was working for Mr. Mayfield looked like 'Coca-Cola' and tasted like 'Coca-Cola'." (Rec., 1363).

W. F. BOYLIN, Nashville, who has printed "Koke" labels for J. C. Mayfield since about 1903, says (Rec., 1073-4):

"This 'Koke' was a cola syrup, a cola drink. * * * I have never seen a cola beverage not the same general color. I have never tasted a cola beverage that didn't have the same general taste."

W. M. SIDEBOTTOM, manager of Skalowskie's, Nashville, and who has been in the retail soda water business for 30 years or more (Rec., 1162):

"I knew J. C. Mayfield fifteen or eighteen years ago at Nashville and at St. Louis. He was engaged in manufacturing soda fountain syrups. *** He manufactured * * * 'Koke'. * * * The taste of this drink from the beverage he was making was similar to all cola drinks. * * * The 'Koke' was 'Koke'—a regular cola taste. The color * * * was dark, very much the same as 'Coca-Cola'." (Rec., 1162-3).

J. B. FREED, soda fountain proprietor and confectioner for 14 years, Nashville (Rec., 1172):

> "I knew J. C. Mayfield about 13 years ago. First met him in Nashville. * * * He was engaged in manufacturing syrups, 'Celery-Cola' and 'Koke'. We bought from him continuously since I began about 13 years ago. * * * This syrup ['Koke'] has always tasted about the same to me all the time, I could not see any difference in it. It is somewhere near 'Coca-Cola'. * * * The color of the drink made from this [syrup] is the same thing, it has always been the same color and similar taste. We are still handling that same product, and 'Coca-Cola', too, and always have during the past 13 years, have never been without them."

(b).—The cola beverage known as "Celery-Cola".

J. C. Mayfield and his successors have continuously manufactured and sold "Celery-Cola" since 1893. "Celery-Cola" is still being manufactured and sold by one of Mayfield's companies,—the J. C. Mayfield Manufacturing Company (Rec., 2423; 1860-1).

J. C. MAYFIELD (Rec., 2436):

> "Celery-Cola was a caffeine drink. * * * It would be classified with the dope drinks."

R. K. SMITH, head dispenser at the United Cigar Stores Company, Nashville (Rec., 1189):

> "I think about the first time I heard of 'Celery-Cola' was about nine or ten years ago. It is similar to 'Coca-Cola' in taste and color."

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1073):

> "The 'Coca-Cola' and 'Celery-Cola' are like all those cola drinks. I could not tell any difference from the other cola drinks. (Rec., 1073). * * * 'Celery-Cola' * * * resembled all these cola drinks. As compared with 'Coca-Cola', you could not tell the difference." (Rec., 1072).

W. M. SIDEBOTTOM, manager of Skalowskie's, Nashville, says that Mayfield was making "Celery-Cola" in Nashville fifteen or eighteen years ago, and that he was handling it then. (Rec., 1162). He adds (Rec., 1162-3):

> "The 'Celery-Cola' was similar to all cola drinks. * * * The color * * * was dark, very much the same as 'Coca-Cola'."

Plaintiff's detective, Frederick Conway Peace, admits that "Celery-Cola" is "similar in color to 'Coca-Cola'." (Rec., 2205-6); while plaintiff's chief detective, H. B. Pierce, admits that "Celery-Cola" has "about the same color", and "pretty much the same general taste", as "Coca-Cola". (Rec., 2132).

The manufacture and sale of "Celery-Cola" during the period above indicated is shown by the following of defendants' witnesses:

J. C. Mayfield, (Rec., 1595 et. seq.; 2424);
J. W. Mayfield, (Rec., 1535 et. seq.);
S. T. Mayfield, (Rec., 1472 et. seq.);
J. C. Mayfield, Jr., (Rec., 1565 et. seq.);
W. F. Boylin, (Rec., 1072);
Adam Diehl, (Rec., 1085);

W. M. Sidebottom, (Rec., 1162);
J. B. Freed, (Rec., 1172);
F. C. Dorider, (Rec., 1195);
W. F. Neal, (Rec., 1329;
A. S. Joseph, (Rec., 1330);
Mrs. M. L. Edwards, (Rec., 1337);
H. O. Adams, (Rec., 1343);
E. D. Montgomery, (Rec., 1357);
John Smith, (Rec., 1387);

The manufacture and sale of "Celery-Cola" as above shown, is admitted by the following of plaintiff's witnesses:

S. A. Ellis, (Rec., 1843);
L. M. Barclist, (Rec., 1845);
C. J. Pogue, (Rec., 1857);
D. E. Moody, (Rec., 1881);
B. U. Hopper, (Rec., 1892);
W. M. Smith, (Rec., 1893);
J. T. Ensley, (Rec., 1901);
Thomas Dickson, (Rec., 1907);
Homer Brewer, (Rec., 1912);
Tom Anderson, (Rec., 1913);
George Anderson, (Rec., 1917);
Mack Crawford, (Rec., 1921);
Walter Thomas, (Rec., 1922);
Will Barrow, (Rec., 1925);
John L. Bevel, (Rec., 1930);
M. J. Handley, (Rec., 1989);
A. G. Weber, (Rec., 2002);
J. W. Huggins, (Rec., 2023);
Norville N. Leaver, (Rec., 2035);
John H. Bohne, (Rec., 2041);
Ernest Higgin, (Rec., 2069);
Henry Hartman, (Rec., 2072).

(c).—The cola beverage known as Wine of Coca".

It is admitted (Plaintiff's brief p. 61) that J. C. Mayfield also manufactured and sold "Wine of Coca".—not only the wine tonic, but the soda fountain beverage as well,—and that it was marketed until at least 1909. It is not denied that "Wine of Coca" was similar in color and taste to "Coca-Cola".

J. C. MAYFIELD says that in 1893 he and his associates decided to market the "Wine of Coca" as a soda fountain beverage. (Rec., 1592-3). "The only thing to leave out was the wine, and put in sugar and water, is my recollection." (Rec., 1592-2433-4). "Wine of Coca" was then manufactured and sold for a number of years, not only in and around Atlanta, but in nearly all the southern states, and as far north as Boston. (Rec., 1593).

In an affidavit made by Mrs. Diva Brown, deceased, (formerly Mrs. J. C. Mayfield), and read into the record in this case by plaintiff (Rec., 1091-7), it is said:

> "When I left the Wine of Coca Company about eight years ago, we sold more goods in some of the southern states than did the Coca-Cola Company, especially in Mississippi, Louisiana, Alabama, and part of Georgia. * * * The Wine of Coca Company is now owned by Boston parties, with headquarters at Boston, Mass."

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola", Atlanta, (Rec., 1292-1296):

> "I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there

were one or two other syrups on the market of the nature of 'Coca-Cola'. 'Wine of Coca' was one of them. * * * There were several at that time. 'Wine of Coca' was originally a medicine, but they afterwards put it into syrup form and put it on the market as a soda fountain drink. * * * That has been a long time ago. (Rec., 1292). * * * I knew 'Wine of Coca' before I got into the bottling business; it was a medicine then, and, as a syrup, about twenty years ago. That syrup at that time, [and] the drink made therefrom, was about the same in color and taste as the color and taste of 'Coca-Cola'." (Rec., 1296).

GEORGE R. EDMONDSON, a retail druggist, Atlanta (Rec., 1301):

"I think years ago, possibly just after I came to Atlanta, we sold a little 'Wine of Coca'."

HENRY BOERGER, proprietor of the Chattanooga Bottling Works, Chattanooga, Tenn. (Rec., 967-969):

"I have bottled a number of cola drinks, 'Wine of Coca', 'Gay-Ola', and Diehl's 'Star-Cola'. I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola' (See *defendants' exhibit 4*), and the same as 'Coca-Cola'. * * * The taste of these cola drinks mentioned are all very near the same, similar in taste. (Rec., 962). * * * The 'Wine of Coca' syrup is the same color as 'Coca-Cola' syrup." (Rec., 969).

F. C. DORIDER knew "Wine of Coca" as a soda fountain drink years ago (Rec., 1195):

C. H. CRIMM, Tennessee manager of the Germania Life Insurance Company of New York, Chattanooga, Tenn. (Rec., 1040):

"I know J. C. Mayfield very well indeed. I first met him in Atlanta. I met him in 1897. At that time he was manufacturing drinks, 'Wine of Coca', and this other stuff that he had there. *** He had two drinks besides the 'Wine of Coca'. * * * That 'Wine of Coca' was a drink something similar to the 'Coca-Cola'. It was a syrup that he was manufacturing. The other drink I spoke of was a similar drink. * * * There was not much difference in taste. * * * The color of two of those drinks at that time was brown, light brown, similar to the color of 'Coca-Cola'."

(d).—The cola beverage known as "Pepsi-Nola".

J. C. MAYFIELD (Rec., 2438):

"The two distinct differences between 'Celery-Cola' and 'Pepsi-Nola' are that 'Pepsi-Nola' had present in it pepsin, and 'Celery-Cola' had celery in it. That is the two distinct differences. * * * 'Pepsi-Nola' was * * * a cola beverage."

The manufacture and sale of "Pepsi-Nola" from 1903 to 1909 is shown by the following, among others, of defendants' witnesses:

J. C. Mayfield, (Rec., 1599);
J. W. Mayfield, (Rec., 1535 et. seq.);
S. T. Mayfield, (Rec., 1474, et. seq.);
E. D. Montgomery, (Rec., 1357);

and is admitted by the following of plaintiff's witnesses:

J. T. Ensley, (Rec., 1901);
Walter Thomas, (Rec., 1922);
D. E. Moody, (Rec., 1884);
C. J. Pogue, (Rec., 1861);

W. M. Smith, (Rec., 1893);
Thomas Dickson, (Rec., 1907);
George E. Anderson, (Rec., 1917);
Will Barrow, (Rec., 1925);
John L. Bevel, (Rec., 1930);
M. J. Handley, (Rec., 1989).

4.

Beverages Manufactured by Others, Having the Same Color and Taste as "Coca-Cola", Which Have Been on the Market For Years.

(a).—"Star-Cola",—since 1900.

ADAM DIEHL Rec., 1083; 1085):

"We manufacture a cola drink, 'Star-Cola'. We have been putting out that drink for about fifteen years. (Rec., 1083). * * * I put 'Star-Cola' on the market for the first time about fifteen years ago. There were eight or ten, or fifteen cola products at that time." (Rec., 1085).

(b).—"Afri-Cola",—since 1899.

LEE HAGAN (Rec., 1292, 1296):

"I got into the 'Afri-Cola' sixteen years ago. (Rec., 1292). * * * I think Mr. Candler knows that I am in business here, Mr. Asa G. Candler, the president of the Coca-Cola Company. I expect he has known it about as long as I have, so far as I know. He has known over all that time all the time I have been making and handling these cola beverages, that I have been engaged in that business

of making them. He has never sued our company or taken any steps to oppose our right to manufacture our products and sell them. The Coca-Cola Company has never taken any steps against our company to contest our right to manufacture our syrup in the way we do, and sell it in the way we do."

ASA G. CANDLER (Rec., 383-4):

"Oh, yes, there is a drink called 'Afri-Cola'. I have heard of it frequently. Yes, sir; I think I have seen it,—I know I have. It is about as near the color of 'Coca-Cola' as they could get it. * * * Yes, sir; there is a 'Ko-Nut',—that is run by the same gang, I think. * * * I understand that Hagan & Dodd make 'Afri-Cola' and 'Ko-Nut'. * * * I think they have been making it ten or twelve years."

F. M. ROBINSON (Rec., 361-2):

"I know there is such a firm as Hagan & Dodd in Atlanta, but I am not personally acquainted with them. * * * I have known this firm, I expect, about ten years or a dozen years, maybe more, I don't remember. I see by the papers they are making a product called 'Ko-Nut'. * * * Just to make a guess at it I would imagine I have seen Hagan & Dodd's advertising, either 'Ko-Nut' or 'Afri-Cola', about ten or a dozen years. It has been a good while. During all of that time I was Secretary of the Coca-Cola Company."

MR. HIRSCH, General Counsel for the Coca-Cola Company, (Rec., 1296):

"We admit on the part of the Coca-Cola Company that Mr. Lee Hagan has been in business as long as he says he has been in business, and that it was

known by the Coca-Cola Company that he had been in that business."

(c).—"Dixie"—since 1898.

LEE HAGAN (Rec., 1291):

"I made a similar product of that character before I began making this 'Ko-Nut' and 'Afri-Cola', called 'Dixie'."

(d).—"Dope",—(Atlanta), since at least 1903.

LEE HAGAN (Rec., 1294):

"There was a concern here in Atlanta once that used to put out a product under the name of 'Dope'. The name of that concern was Dope Company. I think they labeled their bottles 'Dope'. They advertised their product in Atlanta. * * * It was a caffeine drink, one of these cola drinks. It was similar in color and taste to Coca-Cola. This concern in Atlanta put out these goods under the name of 'Dope' twelve years ago, to the best of my recollection."

E. A. SHARP, a retail druggist, Jacksonville, Florida (Rec., 1255):

"I have always heard there was a 'Dope', so far as that is concerned, which was different from 'Coca-Cola'. I first seen it advertised right in Atlanta twelve years ago."

GEORGE J. MARTIN, one of plaintiff's traveling salesmen (Rec., 340-1):

"I heard it rumored years ago, it has been twelve years ago, here in Atlanta, Georgia, a thing came out and they called it 'Dope'."

(e).—"Dope"—(Birmingham), since 1902.

A. E. CAMPBELL (Rec., 1363-4; *Defendants' Exhibits 24 to 27*, inclusive):

> "In 1902 I was steward of the Southern Club and purchasing agent for the bar and cafe, and I put in the Houppert & Worcester products. At that time they had aerated waters, Waukesha Waters, and aerated waters, soda, sarsaparilla, and a product they called 'Dope'. I bought that 'Dope'. I continued to buy it continually while I was steward of the Club, and afterwards, upon opening a business of mine, I continued to handle their goods. * * * *Defendants' Exhibit 24* is a bill-of-sale between Houppert and Worcester, where Worcester sold his interest in the bottling plant. * * * Houppert sold Worcester's interest to Smyly, E. J. Smyly. Smyly and Houppert sold their interest to the National Dope Company. That was a corporation. The National Dope Company continued business quite a while, and then I think it was in 1911 the name was changed to the Birmingham Bottling Company. After that the Birmingham Bottling Company sold that copyright (trade-mark registration of the word 'Dope' in the Patent Office, *Defendants' Exhibits 26 and 27*), to Mayfield & Mayfield."

E. J. SMYLY (Rec., 1392):

> "I am bottling soda waters and 'Dope' and almost all kinds of aerated waters. * * * That 'Dope' comes under the head of caffeine drinks, a cola beverage. I have known of that product, 'Dope', to the best of my recollection, about fifteen years, when I was working for Houpper & Worcester. * * * I acquired an interest in the business of making and selling that syrup in 1905. * * * Houppert & Worcester dissolved partnership. Houppert took the business. Worcester sold out to him. I bought a half interest

from Houppert. * * * When we first went into business together it was known as 'Houppert & Smyly, Birmingham Bottling Works.' We stayed in partnership until we organized the National Dope Company, and we continuously made this product up to that time. After we organized the National Dope Company, the business, good will, etc., was transferred to that company. * * * We continued under the name of National Dope Company until sometime in January, the latter part of January, 1911. After that we re-organized and incorporated under the name of Birmingham Bottling Company. The Birmingham Bottling Company manufactured and sold this syrup after that. After that we sold the rights * * * to Mayfield & Mayfield." (Rec., 1392-93).

J. C. MAYFIELD, Sr., (Rec., 1620):

"*Defendants' Exhibit 28* is an assignment from the Birmingham Bottling Works to Mayfield & Mayfield of the trade-mark 'Dope' and the business and good will connected therewith, dated May 6th, 1913. *Defendants' Exhibit 32* is a bill-of-sale and assignment of the trade-mark 'Dope' and the business and good will connected therewith, from Steve T. Mayfield and James C. Mayfield, trading as Mayfield & Mayfield, to the Koke Company of America, dated the 26th day of December, 1913. This is my signature. After the assignment of this 'Dope' to the Koke Company of America, the Koke Company of America, through its agents, licensees, began and continued to sell 'Dope' continuously. *** They have continued up to the present time."

(f).—"Koke", (Murfreesboro, Tenn.),—since 1902; "Nerve-Ola",—since prior to 1902.

J. W. HUGGINS, a "Coca-Cola" bottler, who form-

erly bottled a cola beverage to which he applied the nam
"Koke" (Rec., 2012-13):

> "I swore in my application for registration of t
> word 'Koke' that the trade-mark 'Koke' had be
> used continuously in our business since about Ma
> 1st, 1902, and I think that is about true. * * * T
> first product we bottled and labeled 'Koke' was,
> think, 'Nerve-Ola', but we have bottled several di
> ferent things that we branded 'Koke',—several
> these different cola drinks. What we got from t
> 'Nerve-Ola' people was the completed syrup.
> looked like 'Coca-Cola' and tasted pretty much li
> 'Coca-Cola'. We took that product and bottled
> and labeled it 'Koke'. Then we manufactured
> syrup that we labeled 'Koke' that we made from
> formula that we were trying to reproduce 'Coc
> Cola'. We got that formula from somebody, I thin
> in Florida. * * * We made that product ourselv
> from the formula that we got. * * Then we ha
> Wampole try to make us up some syrup by th
> formula,—Wampole, of Philadelphia. This syr
> that we made we percolated the coca leaves and g
> the extract out of it. *** We put caffeine in. (Re
> 2012-13). * * * We used to buy from H. K. Wam
> pole & Company of Philadelphia, I believe, in syr
> form by the barrel, a syrup that they called 'Nerv
> Ola', which we used more than anything else, a
> then we ourselves mixed the syrups that we us
> this name [Koke] on. (Rec., 2007). * * * We so
> 'Koke' from 1902 up until 1909 (Rec., 2017). * *
> Ultimately a deal was consummated where
> Christy & Huggins and the Murfreesboro Bottli
> Works sold to Mayfield, or his company, this re
> istered trade-mark 'Koke'." (Rec., 2008; see *D*
> *fendants' Exhibits 67 and 129).* See also S.
> Christy, the partner of J. W. Huggins. (Rec., 202
> 8-9).

(g).—"Koke",—Texas)—since 1905.

J. G. PYLE (Rec., 1724):

"The first time I ever heard the word 'Koke', I was in West Texas, I think it was about 1904, at Albany, Texas, and I went and asked for 'Coca-Cola'. They said we have not got Coca-Cola. I said, what have you got? He said, Koke. I said, what is Koke? He said, well, it is something similar to Coca-Cola. I asked him to give me a 'Koke', and he drew a 'Koke'. * * * They drew the 'Koke' out of a keg, a five gallon keg. He told me at the time where it came from. He said it is made over there at some small town, maybe Cisco, something like that."

(h).—"Cola-Ade",—since 1898.

F. C. DORIDER (Rec., 1196-1198):

"We began handling 'Kola-Ade' I think about eight or nine years ago. * * * We sold a good deal of 'Kola-Ade' for awhile. (Rec., 1196). *** 'Kola-Ade' is made in Atlanta, I think. I don't know whether anybody knew about 'Kola-Ade' or not. We knew it and advertised it. Stenciled it in our floor." (Rec., 1198).

W. M. SIDEBOTTOM (Rec., 1163):

"There are a great many cola drinks on the market,—the 'Celery-Cola', 'Star-Cola', 'Cola-Ade'. I have known of cola drinks on the market, to my best recollection, twenty-five or twenty-eight years, I guess."

R. W. BROWN (Plaintiff's Witness), (Rec., 682):

"There is a bunch of drinks on the market similar

to 'Coca-Cola'. I don't recollect the names of all of them, but there are quite a number of them. I think there is one called 'Cola-Ade'."

(i).—"Queen-Ola", "Rye-Ola", "Wise-Ola", "Ala-Cola",—since 1903.

D. E. MOODY (Plaintiff's Witness). (Rec., 1881-1887):

"I got acquainted with Mr. J. C. Mayfield, Sr., about the latter part of 1903 or the first part of 1904. I bought a third interest in the bottling plant over on Powell Avenue and 20th Street in the latter part of 1903, and Mr. Mayfield shortly after that visited that place and I got acquainted with him. B. U. Hopper and John T. Ensley, were interested with me in that bottling plant. We called it the Celery-Cola Company. (Rec., 1881). * * * You ask how many cola drinks there were on the market in Birmingham at the time I was in the bottling business with the Celery-Cola Bottling Company; why, at that time Mr. Peck was manufacturing a drink over here which he called 'Rye-Ola', and there was a 'Wise-Ola' bottling plant,—those two are the only ones that I remember, at that time. * * * Yes, sir, I remember about 'Ala-Cola' also, and there was one at Bessemer,—I had forgotten about that. * * * I have been making a drink I call 'Queen-Ola' up to last fall. * * * I have been making it some three or four years. Yes, sir; that is a syrup for making a soda fountain beverage. (Rec., 1888). ***

(j).—"Lime Juice & Cola",—since 1905.

EDWARD T. LANGAN (Plaintiff's Witness). (Rec. 896):

"I have dispensed 'Lime Juice & Cola' and 'Cola

Mint'. * * * That has been on the fountain right along for the last ten years. Yes, sir; it is the same color as 'Coca-Cola'. I have handled it and know that it has been on the market for the last ten years. It is made by Parke-Davis & Co., of Detroit."

(k).—"Dr. Pepper",—since 1897.

J. M. PENLAND (Plaintiff's Witness), of Waco, Texas, (Rec., 1983):

"The drink known as 'Dr. Pepper' is still being sold in Waco. I don't know how long it has been on the market, but I have known of it fifteen or eighteen years."

JACOB SCHRODT, a retail druggist, Dallas, Texas, (Plaintiff's Witness), (Rec., 743):

"'Dr. Pepper' is a soda fountain beverage, and is a syrup like 'Coca-Cola'."

C. J. THORNTON, a retail druggist, Hattiesburg, Miss., (Rec., 1760-7):

"I have heard people call for 'dope' ever since there has been a cola on the market. I have heard 'Dr. Pepper' called 'dope'. * * * I used to drink it and I called for it as 'dope'. It is supposed to be good for headache. * * * Take 'Dr. Pepper', that is the first I ever heard called 'dope'. (Rec., 1760). * * * About eighteen years ago I called for 'dope' and got a drink of 'Dr. Pepper's'. * * * The first time, eighteen years ago, was 'Dr. Pepper', was the first I ever called 'dope'." (Rec., 1767).

W. A. HICKMAN, Monticello, Miss., (Rec., 1828):

"I handle 'Dr. Pepper' at our soda fountain."

(l).—"Orin-Cola",—since 1904.

NORVILLE N. LEAVER, (Plaintiff's witness), (Rec., 2036-7):

> "I am a manufacturer of soft drinks. * * * I put out a drink known as 'Orin-Cola'. That is a drink something similar to 'Coca-Cola'. * * * It looks like 'Coca-Cola'. It is colored the same as 'Coca-Cola'. * * * I have been making this drink since March 1st, 1904. * * * I don't know why I color this particular drink the color it is, except it is the custom from experience, when people ask for lemon soda you have to have a white soda, and if they ask for sarsaparilla it is black; if they ask for 'Dr. Pepper' it is black; and we color that for that simple reason, I suppose. I give it the flavor it has because people like a flavor of that kind."

JOHN H. BOHNE, (Rec., 2045):

> "After I left Mayfield I went in partnership with him [Norville N. Leaver] in 1904 in the manufacture and sale of a drink called 'Orin-Cola'. * * * The color of 'Orin-Cola' was a brown color like the usual cola drinks. Most all of the cola drinks I ever saw are about the same color. I never saw any difference in them so far as the color is concerned. Burnt sugar produces that color."

Drinks Now on the Market Having Same Color and Taste as Coca-Cola.

(a)

Physical Exhibits.

In the tabulation below the first column shows the exhibit number, the second the name of the drink, the

third the place where purchased, the fourth the date of purchase, the fifth by whom purchased or identified, and the sixth the page of the record where the exhibit is identified:

1	2	3	4	5	6
Defts'. Ex. 1	Kola	Chatta. Bot. Works	2-11-15	Henry Boerger	968
Defts'. Ex. 2	Tru-Cola	Union-Bot. Works	2-11-15	R. F. Zimmerman	979-80
Defts'. Ex. 3	Fletcher's Cola	Nashville	2-17-15	John D. Fletcher	1090 (Orig. Tr. 440)
Defts'. Ex. 4	Star-Cola	Diehl & Lord, Nashville	2-17-15	Stipulation	1084 (Orig. Tr. 807)
Defts'. Ex. 6	Coca-Cola	Open Market, Nashville	2-17-15	Stipulation	(Orig. Tr. 807)
Defts'. Ex. 43	Star-Cola	Crockett Cafe, Nashville	11-30-14	J. W. Mayfield	1523
Defts'. Ex. 44	Star-Cola	W. P. Watson, Nashville	11-30-14	J. W. Mayfield	1523
Defts'. Ex. 45	Star-Cola	Harry Seidell, Nashville	11-30-14	J. W. Mayfield	1523
Defts'. Ex. 46	Cola-Nip	Peel's Bar, Birmingham	12-16-14	J. W. Mayfield	1523
Defts'. Ex. 47	Cola-Nip	Mecca Hotel Bar Birmingham	12-16-14	J. W. Mayfield	1524
Defts'. Ex. 48	Chero-Cola	Svibone, Bessemer, Ala.	12-16-14	J. W. Mayfield	1524
Defts'. Ex. 49	Bee-Cola	Simp. Bervin Grocery Store, Bessemer, Ala.	12-16-14	J. W. Mayfield	1524
Defts'. Ex. 50	Cer-o-t's Cola	Jesse Call's, Nashville	11-15-14	J. W. Mayfield	1524
Defts'. Ex. 51	Kola-Rex	Reliance Bar, Birmingham	12-17-14	J. W. Mayfield	1524
Defts'. Ex. 52	Dope	W. L. Deiheim's, Birmingham	12-17-14	J. W. Mayfield	1524
Defts'. Ex. 53	Co-Co	Johnson Bros., Birmingham	12-17-14	J. W. Mayfield	1524
Defts'. Ex. 54	Star-Cola	Mike St. Charles, Nashville	11-30-14	J. W. Mayfield	1524
Plff's. Rebuttal Ex. 69	Dope	Florence Bar, Birmingham	2-26-15	M. D. Ziegler (Frank Clapp	1923 2182
Plff's. Rebuttal Ex. 73	Misty-Cola	Terminal Bar, Birmingham	3-15-15	Frank Clapp M. D. Ziegler	2181 1923

Plff's. Rebuttal Ex. 74	Cola-Mint	Woodward Bar, Birmingham	3-15-15	Frank Clapp M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex. 76		Morris Hotel Bar	3-15-15	Frank Clapp M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex 77		Morris Hotel Bar	3-26-15	Frank Clapp M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex. 125	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 126	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 127	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 128	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 129	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 130	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 131	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex 132	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex. 133	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them			Dr. H. B. Fuller	2267
Plff's. Rebuttal Ex 134	Said to be Coca-Cola			Dr. H. B. Fuller	2267

6.

Testimony of Defendants' Wit esses Regarding Color and Taste of Beverages.

(a).—Manufacturers.

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1641):

"There are a great many other cola drinks besides our 'Koke' and 'Dope' on the market today to my knowledge. I know of quite a number and have heard of at least a couple of hundred. I can enumerate some. There is 'Wine-Coca', 'Ala-Cola', 'Wise-Ola', 'Afri-Cola', 'Ko-Nut', 'Coca-Nola', 'Pepsi-Cola', 'Lemon-Cola', 'Chero-Cola', 'Nifty-Cola', 'Tru-Cola', and 'Cola-Nip', 'Star-Cola', 'Diehl's Cola—no, not Diehl's Cola, 'Gerst's Cola,' and 'Mar-Cola', 'Farri-Cola', 'Luck-Ola', 'Mint-Cola', 'Lime-Cola',—or 'Lime-Ola', I do not know which. 'Wine of Coca' was a soda fountain syrup since 1893. All these different beverages I have mentioned are of the same color. * * * Some of them have a little different taste. It is a pretty hard matter, but, of course, the difference comes, the same pieces of goods will vary in flavor, but you might say they are all uniform flavor, some little variation on account of age, maybe. The color of all these beverages is about the same as our product 'Koke' and 'Dope'. I never saw a cola beverage that was not the same general color, or the same general taste."

ADAM DIEHL, of Diehl & Lord, bottlers of Soft drinks, and manufacturers of "Star-Cola", Nashville (Rec., 1084-5):

"There are forty or fifty other cola drinks on the

market today that I know of, I could not mention them all. I have known of cola drinks on the market I suppose twenty-five years. They are all about the same color as 'Coca-Cola'. All cola drinks have the same taste. (Rec., 1084). * * * I have never seen a cola product not the same general color as these I have spoken of. I have never tasted one not the same general taste as ours." (Rec., 1085).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola", Nashville (Rec., 1091-3):

"I know of others on the market, cola beverages, probably a dozen or more. They are all the same color as 'Coca-Cola', all that I ever saw. They are similar in taste to 'Coca-Cola'. They all have pretty much the same general taste. We color our drink with caramel. (Rec., 1091). * * * I have never seen a cola beverage not the same general color, I have never tasted one not the same general taste, as 'Coca-Cola'. My beverage is similar to it. * * * Those bottles, the color and taste of the drink, are common to the trade." (Rec., 1093).

LEE HAGAN, president of The Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1291-2):

" The color of 'Ko-Nut' syrup is similar to the color of 'Coca-Cola' and the other cola beverages on the market. I made a similar product of that character, before I began making this 'Ko-Nut' and 'Afri-Cola', called Dixie'. (Rec., 1291. * * * I cannot say how many caffeine preparations there are on the market at the present time, except I know there are a good many of them. There is several right around this locality, such as 'Chero-Cola', 'Gay-Ola', 'Rye-Ola' 'Tru-Cola', 'My-Coca', 'Joy-Ola', 'Glee-Ola' * * * 'Mo-Ola', * * * 'Ala-Cola', 'Uncle Sam'. I have

known of cola drinks, these caffeine drinks, not counting 'Coca-Cola', for about sixteen years. I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups on the market of the nature of 'Coca-Cola', 'Wine of Coca' was one of them, and I have forgotten what the others were; there were several at that time. 'Wine of Coca' was originally a medicine, but they afterwards made it into syrup form and put it on the market as a soda fountain drink. * * * I have never seen a cola drink that was not of the same general color as our product and 'Coca-Cola' are today. They are all colored with caramel coloring. * * * I color our product with caramel coloring." (Rec., 1291-2).

(b).—Bottlers.

HENRY BOERGER, president of the Chattanooga Bottling Works, Chattanooga, who has been bottling soda water for 26 years (Rec., 967, 966-70) Chattanooga, Tenn.:

"During that time I have bottled a good many different flavors of lemon, strawberry, ginger ale, and all the general kinds of soft drinks. I have bottled a number of cola drinks, 'Wine of Coca', 'Gay-Ola', and Diehl's 'Star-Cola'. I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola', and the same as 'Coca-Cola'. 'Gay-Ola' has the same color. The taste of these cola drinks mentioned are all very near the same, similar in taste. (Rec., 967). * * * I have known other drinks on the market similar in color, taste, and appearance to 'Coca-Cola' for about ten or eleven years. (Rec., 968). * * * The color of the syrup of 'Gay-Ola' is similar with 'Coca-Cola' syrup. The color of 'Star-Cola' syrup is the same color as 'Coca-Cola' syrup. The 'Wine of Coca' syrup is the same color as 'Coca-

Cola' syrup. I have never seen any syrup for a cola beverage that was not that same color. I have never seen a cola beverage on the market that was not substantially the same color as 'Coca-Cola'. * * * There are hundreds of cola beverages on the market. Besides those I have mentioned are 'Afri-Cola' and 'Ala-Cola'. 'Afri-Cola' has been on the market ten or eleven years." (Rec., 969-70).

R. F. ZIMMERMAN, proprietor of the Union Bottling Co., Chattanooga, Tenn., which bottles "Tru-Cola" (Rec., 978-81):

"I bottle cola drinks. (Rec., 978). * * * When I first went in business I bottled a cola drink that I made myself, practically five years ago. * * * It compared with the color of 'Coca-Cola' in that it was colored with burnt sugar, practically the same color. I could not distinguish one from the other, and the tastes were very much alike, the ingredients were almost the same as the original 'Coca-Cola' of today. (Rec., 978-9). * * * I have been bottling the drink in Exhibit No. 2 ['Tru-Cola'] practically four years, also sarsaparilla and root beer. * * * I have known the drinks sarsaparilla and root beer since '91, twenty-five years ago, or more. The color of root beer and sarsaparilla that I knew at that time, compared with the color of this drink today, is practically the same. They are all colored with burnt sugar coloring. The color of root beer is practically the same as that of 'Coca-Cola' or any cola beverage. * * * I have known those other cola drinks ever since I have been in business, since '91. When you come in contact with these cola drinks, so many, you cannot keep track of them. Drinks similar in taste, color, and appearance to 'Coca-Cola' that I know of on the market today are 'Lemon-Cola', this 'Rye-Ola', 'Roxie-Cola', 'My-Ola', 'Misti-Cola', 'Gay-Ola', and 'Ameri-Cola', of Americus, Georgia, and this other,

'Mar-Cola', that is made in some place. I would have to sit down all day and think of them. It would be enough to mention all day long and think of them. There is another one in town, 'L'Aroma', *this is a dope drink.* * * * I have known of cola drinks ever since I have been in Chattanooga, and practically before that when I traveled for the brewery, I saw cola drinks all over the country, scattered around, but I paid very little attention to them, then, because I was selling beer. * * * I have never known a cola drink on the market that was not substantially the same color as 'Coca-Cola'. They are all practically the same taste." (Rec., 980-1).

W. M. POLLOCK, proprietor of the Nashville Bottling Works, Nashville, Tenn., which bottles "Fletcher's Cola" (Rec., 1199-1201):

"I have been connected with other bottling works. I have bottled other cola drinks. We have bottled 'Coca-Nola', 'Rye-Ola', 'Gay-Ola', 'My-Ola" 'Star-Cola', and bottled other drinks. *** I have heard of, I guess, about forty or fifty, something like that, different cola drinks. I have known of other cola drinks ever since I have known anything about working at the bottling plant, that has been about eight years ago. (Rec., 1199). * * * The color of these different cola beverages are about the same." (Rec., 1201).

C. N. BAKER, a soda water bottler, Newman, Ga., (Rec., 1406-7):

"I could not name all the different colas I have bottled. I have bottled the drink I got from Mr. Mayfield, called 'Koke', (Rec., 1406). * * * Since then I have bottled 'Cola-Queen' * * * 'My-Coca', * * * 'Coca-Nola', 'Rye-Ola', and I do not know how

many. * * * There is not but very little difference in all these cola drinks in taste and color, if any." (Rec., 1407).

(c).—Dealers In Bottled Goods.

A. F. ENSINGER, bar tender at the Eagle's Club, Chattanooga (Rec., 984-5):

> "Some of the cola drinks I have dispensed are 'Coca-Cola', 'Koke', 'Ala-Cola', 'Tru-Cola', 'Oze-Ola', and 'Maud Muller'. I do not know whether I can recall any others or not; there has been six or eight more, I guess, that, during that time, would come and go. I have known of other cola drinks on the market for fourteen years past. As compared with the color of 'Coca-Cola', they all look about the same. As compared with the taste of 'Coca-Cola', I could not tell any difference."

JOE QUINN, a bar tender, Chattanooga (Rec., 991-2, 4):

> "We handle 'Koke', white soda, 'Poinsetta', and 'Sinalco', and this 'Pan-pepsin', we have that, too. * * * 'Ala-Cola', we handled that. Other cola drinks I handled besides that were 'Star-Cola', 'My-Coca', and the stuff made by Mayfield, and had some made by Gerst, I forget the name of it. I have known of 'Tru-Cola' and other cola products on the market similar to 'Coca-Cola' for ten or twelve years. There is no difference in the color of them, compared with the color of 'Coca-Cola'. * * * I do not see any difference [in taste] to amount to anything, the same general taste. (Rec., 991). *** I have never seen a cola drink that was not substantially similar in color to 'Coca-Cola'. *** The color is all the same." (Rec., 994).

F. E. HOOPER, a retail grocer, Chattanooga, Tenn., (Rec., 997):

> "I have handled cola drinks. I have handled 'Coca-Cola', I have handled 'Koke'—I handle 'Koke' now,—'Digestol', and most all,—I buy from all the wagons that go around town. *** These cola drinks are pretty much the same color as' Coca-Cola'—all in dark bottles, and look alike."

M. J. COSTELLO, a bar tender, Chattanooga, Tenn., (Rec., 1000, 1002):

> " I have been handling soft drinks for ten years. Bottled goods, soft drinks. I have handled white soda, 'Digestol', 'Sinalco', 'Ginger-Ale' 'Ala-Cola', 'Tru-Cola', 'Koke', 'Rye-Ola', the coca-cola drinks, 'Ala-Cola', 'Tru-Cola' and 'Coca-Cola', seem to me to all have about the same color. (Rec., 1000). * * * I have never seen a cola drink not the same general color as 'Coca-Cola." (Rec., 1002).

A. W. STANLEY, proprietor Stag Hotel and Bar, Chattanooga, (Rec., 1004):

> "I have handled 'Tru-Cola' and 'Ala-Cola'. They are all about the same color as 'Coca-Cola'. * * * I have never seen a cola drink that was not substantially the same color as 'Coca-Cola'."

R. W. WAYMAN, a bar tender, Chattanooga, (Rec., 1014-15):

> "I handle soft drinks in connection with my business, some of them being 'Tru-Cola', white soda, red soda, 'Maud Muller', Poinsetta', 'Sinalco', 'Koke', 'Dope',—they call it 'Dope'. Other cola drinks I have known of are 'Ala-Cola'. I have known of

these other cola drinks ever since I have been in business, since they have been out. * * * The color of these different cola drinks as compared to the color of 'Coca-Cola', is about the same, I think. *** They have the same general taste, along the same general lines. (Rec., 1014). * * * Cola drinks are the same general color as 'Coca-Cola'." (Rec., 1015).

W. F. STRICKLAND, a bar tender, Chattanooga, (Rec., 1013):

"We handled 'Koke', 'Maud Muller', that is a dope, and we used to handle Zimmerman's stuff, 'Dope', I believe it was, also handled 'Coca-Cola'. The color of these different cola drinks, so far as I can see, are about the same."

LUKE POGUE, bar tender, Patten Hotel, Chattanooga, (Rec., 1060):

"I have dispensed a general line of soda water, red, and white, ginger ale, 'Digestol', 'Coca-Cola', 'Rye-Ola', 'Gay-Ola', 'Ala-Cola', 'Nerve-Ola', 'Koke', and 'Gay-Nol'. Most all *coke drinks* have the same color. * * * I have known of these other drinks on the market similar to 'Coca-Cola' about ten years."

J. C. McDONALD, a bar tender, Chattanooga, (Rec., 1067-8):

"I have 'Coca-Cola', 'Sinalco', 'Poinsett... (1067) * * * I have got 'Koke' since I have been in business here. When in business with other people we had 'Coca-Cola' for sale for a while. We had 'Ala-Cola', 'Maude Muller', and 'Tru-Cola'. The color of those drinks, as compared with 'Coca-Cola', are practically the same thing. I could not see any difference in them; no one could see any difference at

all. I could not see any difference in the taste compared to 'Coca-Cola'. * * * I could not distinguish a glass of 'Coca-Cola', by its taste, from the other cola drinks I have handled. * * * I have never seen a cola drink not practically the same color as 'Coca-Cola', and practically the same taste."

J. M. WHEELER, a bar tender, Chattanooga, (Rec., 970, 972):

"I handled * * * 'Coca-Cola', 'Maud Muller', 'Koke', 'Rye-Ola', and Tru-Cola'. I do not know as I can tell any difference in the color of these beverages, compared to the color of 'Coca-Cola', as they all appear to be the same thing. * * * There is very little difference in the taste of these cola beverages, as compared with the taste of 'Coca-Cola'. (Rec., 970). * * * The color of 'Koke' is the same as the color of other cola beverages. I do not see any difference in the taste. * * * I have known of these other cola beverages similar to 'Coca-Cola' in color, taste, and appearance, four or five years." Rec., 972).

TOM COLLINS, steward at the Eagle's Club, Chattanooga, (Rec., 988-90):

"Some soft drinks we have are white soda water, 'Koke', 'Coca-Cola', 'Poinsetta'. * * * I know of 'Ala-Cola' and this 'Maude Muller', but we do not handle them any more. * * * The color of these cola drinks are the same as the color of 'Coca-Cola'. * * * I could not tell any difference much in the taste either. *** I have known the product root-beer and sarsaparilla ever since I have been here in Chattanooga, about twenty-eight years. The color of root beer and sarsaparilla is about the same as 'Coca-Cola'. Rec., 988). * * * I have known of other drinks on the market in color, taste, and appearance to Coca-Cola', I suppose, for ten years. Some of the

drinks on the market similar in color, taste, and appearance to 'Coca-Cola', I suppose, for ten years. Some of the drinks of that kind are 'Star-Color', that tastes like it. I could hardly tell the difference. This 'Maude-Muller' tastes a good deal like it." Rec., 989-990).

E. W. FREEMAN, a bar tender, Chattanooga, (Rec., 973, 5, 6):

"I have handled cola drinks. Some of the drinks are 'Coca-Cola', 'Rye-Ola', 'Ala-Cola', Maude Muller'. (Rec., 973). * * * I am a bar tender and have known of the cola drinks other than 'Coca-Cola' possibly eight years, and perhaps longer. I have been handling other cola drinks since I have been in the saloon business the greater *portion* of that time. (Rec., 974). * * * I have never seen a cola beverage that was not the same general color of 'Coca-Cola'. They generally taste about alike to me." (Rec., 975-976).

R. W. LOCHRIE, a bar tender at the Woodward Bar, Birmingham, (Rec., 1339-40):

"I have dispensed soft drinks there, and cola drinks, also. We are handling at present 'Nifti-Cola.' Before we began handling 'Nifti-Cola', we handled 'Cola-Nip' and 'Coca-Cola'. (Rec., 1339). * * * These different cola drinks are practically all the same color." (Rec., 1340).

(d).—Dealers In, and Dispensers of, the Soda Fountain Product.

W. M. SIDEBOTTOM, (Rec., 1163):

"There are now a great many cola drinks on the market, 'Celery-Cola', 'Star-Cola', 'Cola-Ade'. I have known of cola drinks on the market to my best

recollection twenty-five or twenty-eight years, I guess. I have never seen a cola drink that was not the same general color. All cola drinks are very similar in taste. At the establishment where I am now located we dispense *Atlanta* 'Coca-Cola'; dispense no others besides that."

J. G. BOOTH, soda dispenser at Paul and John Stumbs,' Nashville, (Rec., 1169-70):

"We are dispensing 'Coca-Cola' straight at the place where I am now working. I have known of cola drinks ever since I have known the original 'Coca-Cola'. (Rec., 1169). * * * They look alike." (Rec., 1170).

J. C. PRICE, now proprietor of a restaurant, but formerly a soda dispenser, Nashville, (Rec., 1205-6):

"There are many different brands of cola drinks I have served. I could not call them all. I know a few, 'Arrow-Cola', 'J. D. F. Cola', 'Koke' and 'Cola', 'Gay-Ola', 'Afri-Cola', and I have dispensed 'Star-Cola', and 'Gerst's Cola', too, and 'Coca-Cola'. I have worked in Nashville, St. Louis, Evansville, and Birmingham. At these different towns I sold different cola drinks. (Rec., 1205). * * * The taste and color of these different cola drinks is almost the same." (Rec., 1206).

BRANCH DARDEN, soda dispenser at Henry Skagg's soda fountain in the Stahlman Building, Nashville, (Rec., 1123-4):

"The cola drinks I have dispensed are 'Fletcher's Cola', 'Dope', 'Coca-Cola', and others I cannot remember. I have known of these other cola drinks, other than 'Coca-Cola', most ever since I have been in the business. (Rec., 1123). * * * Of [other] cola

drinks I have known of [are] 'Ala-Cola', 'Star-Cola', 'Fletcher's Cola'. They are almost the same color, looks to me like about the same color * * * pretty much the same general taste. They are almost the same color, they seem to me. * * * Just to a casual glance they look about alike." (Rec., 1124).

P. D. JOHNSON, soda dispenser at the Warner Drug Co., Nashville:

"We dispense 'Coca-Cola' and a black syrup called 'Dope'. They used 'Fletcher's Cola' and have used 'Diehl's Star-Cola'. (Rec., 1151). * * * The general color of these cola drinks are about the same. At the baseball park here in the summer time they serve Pepsin and Diehl's 'Star-Cola'. * * * Diehl's 'Star-Cola' is all that is advertised out there. * * * It is about the same color, taking the concentrated syrup and comparing the two. The beverage that is made from the syrup is about the same as 'Coca-Cola'." (Rec., 1152).

W. W. RANDOLPH, soda dispenser at the Hoodenpile Drug Co., Nashville, (Rec., 1160-1):

"Some of the cola drinks that we have dispensed are 'Star-Cola', 'My-Cola', 'Pepsin-Cola', and I guess about a dozen others. *** I have heard of about a dozen cola drinks on the market several years back, as well as I can remember, about eight years, any way. (Rec., 1160). *** The color and taste of these different cola drinks are all about the same." (Rec., 1161).

F. H. WILLIS, soda dispenser at "Ha Ha Store, Nashville, (Rec., 1191):

"We are dispensing a general line of soda drinks. * * * Besides 'Coca-Cola', we have 'Candy-Cola'. The color of 'Candy-Cola' is very similar to 'Coca-Cola'."

MATT WILSON, proprietor of a retail drug store, Nashville (Rec., 1209):

"I dispense 'Gerst's Cola'. It looks like 'Coca-Cola', and I never did see any difference in the taste."

F. C. DORIDER, for 24 years in soft drink and confectionery business, Nashville (Rec., 1195-6):

"We handled different kinds of cola, 'Cola-Ade', 'Celery-Cola', 'Coca-Cola', and a good many of those colas, I cannot recall them. * * * Cola drinks besides those I have mentioned are 'Star-Cola', 'Cola-Ade', and maybe some others. (Rec., 1195). * * * They were very much alike in color." (Rec., 1196).

WILLIAM F. DAVIS, an attorney-at-law, and a stockholder in the Davis Funston Drug Co., which has a chain of drug stores in Nashville (Rec., 1102):

"We dispense cola drinks. Some [of the] drinks are 'Coca-Cola', 'Afri-Cola', 'Fletcher's Cola', 'Ala-Cola', 'Arrow-Cola', I believe it is, 'Star-Cola', 'Gerst's Cola', not all of these at every place, at different places, at different times, we have used those cola drinks. I knew of other cola drinks besides 'Coca-Cola' before 1909. * * * Cola drinks on the market today—there are hundreds coming in everywhere; some have been on the market for several years, I could not tell you how many. The color of these different cola drinks, compared with the color of 'Coca-Cola', is not much different. The taste in many cases is almost indistinguishable."

C. P. EMBREY, proprietor of Embrey Drug Store, Chattanooga (Rec., 1019-20).

> "I dispense soft drinks at my soda fountain. I dispense cola drinks there. I dispense 'Coca-Cola' and one named 'Ko-Nut'. * * * I have heard of 'Tru-Cola'. * * * There is a great many cola drinks on the market. The color of the syrup of these different cola drinks is identical with the color of the 'Coca-Cola' syrup. * * * I have known of the drink Root Beer fifteen or twenty years, I reckon. * * * The root beer I have known for the past fifteen or twenty years has been substantially the same color as it is today. (Rec., 1019). * * * We do not handle Hires' root beer, we have not for years. I could not tell any difference between the root beer we handle and Hires'. The color is about the same." (Rec., 1020).

F. M. BOGART, prescription clerk and soda dispenser, Chattanooga (Rec., 1070):

> "We serve 'Coca-Cola', 'Ko-Nut', 'Afri-Cola' and 'Mays-Ola'. * * * They are very much the same in taste as 'Coca-Cola'."

C. H. JOUETT, a retail druggist, associated with the Live & Let Live Drug Co., Chattanooga, and formerly connected with the Miller Pharmacy at Chattanooga (Rec., 1051):

> "We handled 'Coco-Cola', 'Cola-Nut' and 'Ala-Cola', I think; I do not remember whether we handle any other cola drinks or not. I have known of drinks similar in color, taste and appearance to 'Coca-Cola' I presume for ten or twelve years, probably longer, fifteen years, probably. They are alike in color and taste as far as I am able to tell. ***

DR. H. O. NULL, a practicing physician and proprietor of a retail drug store, Chattanooga (Rec., 1063):

> "We handle cola drinks, the only cola drinks we have now is 'Coca-Cola' and 'Ko-Nut'. I have handled a number in my time. I have handled 'Wise-Ola', 'Luck-Ola', * * * and 'My-Ola'. I have handled 'Coca-Cola' during the time I have had the soda fountain. We have always handled some other cola drink. * * * In a general way they are all similar to each other. The taste of these different cola drinks, compared with the taste of 'Coca-Cola', is very similar."

BURTON JONES, a retail druggist, Chattanooga (Rec., 1006):

> "I dispense cola drinks, 'Coca-Cola' and 'Tru-Cola'. * * * The color of 'Tru-Cola' syrup is a brown liquid about the same as 'Coca-Cola'. I could not distinguish the difference in color between 'Tru-Cola' syrup and 'Coca-Cola' syrup. I could not distinguish the difference in color between the finished drinks as served at the fountain, and 'Coca-Cola'. I could not distinguish the difference in taste between 'Tru-Cola' and 'Coca-Cola'."

T. H. LEVER, proprietor of the K. W. N. Pharmacy, Spartanburg, S. C. (Rec., 1228, 1245-6):

> "I handle the 'Dope' and 'Koke' and 'Coca-Cola'. I know a number of others, 'My-Coca', 'Ko-Nut', 'Rye-Ola', 'Gibb's Cola'. * * * I have known of cola drinks ever since I have been in the drug business, about eight years. These cola drinks are almost the same color, * * * and just about the same in taste. (Rec., 1228). * * * At the Union Drug Co. I handled a product, I cannot recall the name, Mr. Sizemore is the gentleman that sold it at that time. It was a heavy cola syrup; the taste and color of

it was about the same as 'Coca-Cola'. I handled it before I handled 'Koke' and 'Dope'. (Rec., 1245-1246).

E. A. SHARP, proprietor of the Terminal Pharmacy, Jacksonville, Fla. (Rec., 1250, 4, 6):

"We dispense ice-cream sodas, root beer, Coca-Cola, Koke' Dope, Brain-Ol, Gay-Ola, you know about the line of stuff we handle, all those. We do not dispense Gay-Ola right at the present time. (Rec., 1250). * * * Every man in my town has always handled three or four different kinds of cola drinks. (Rec., 1254). * * * All these drinks are similar in color and taste to 'Coca-Cola'." (Rec., 1256).

ROBERT E. OUSLEY, a retail druggist, Kosciusko, Miss. (Rec., 1447):

"This drink 'Ko-Nut' is rather similar to 'Coca-Cola'. You could not hardly tell the difference between them by looking at or tasting them."

C. J. THORNTON, proprietor of the Corner Drug Store, Hattiesburg, Miss. (Rec., 1759-60, 1782):

"I dispensed at my soda fountain a general line of all flavors, and I sold 'Afri-Cola', 'Coca-Cola', 'Dope', 'Ko-Nut', 'Luck-Ola'. * * * The color of these cola drinks is something like the color of root beer, colored with caramel coloring, I was always told. The color of the various cola drinks compare very similar with each other. They all taste alike to me. I never saw a cola drink that was not of the same general color and taste. (Rec., 1759, 1760). * * * Sarsaparilla and root beer are of similar color, and lots of things are the same color; creme soda is the same color." (Rec., 1782).

(e).—Members of the general public.

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1072-4):

"I know J. C. Mayfield. Have known him, I should say, for twelve or fourteen years. * * * Then he was manufacturing 'Celery-Cola'. * * * It resembled all these cola drinks. As compared to 'Coca-Cola', you could not tell the difference. (Rec., 1072). The 'Coca-Cola' and 'Celery-Cola' are like all those cola drinks. I could not tell any difference from the other cola drinks. (Rec., 1073). * * * We printed labels for hundreds of people for different cola drinks, 'Haskell's Cola', at Cookeville, North Carolina, and we printed 'Koke' labels for Kelley & Westmore, at Franklin, Ky., and we printed 'Texa-Cola', 'Call's-Cola' for some firm in North Carolina, Fletchers Cola, a Nashville concern, Diehl's 'Star-Cola', for Diehl & Lord, of Nashville, 'Gerst's Cola', for Gerst's Bottling Works, of Nashville, and we printed Heck's 'Star-Cola' for Heck, of Nashville. There were so many of them. I can get you a list of them from the office. I have known of cola drinks on the market other than 'Coca-Cola' practically ever since I can remember, ever since I have been in Nashville, any way, that will be eighteen years the first of January. The color of all these cola drinks I have seen, as compared with 'Coca-Cola', are all practically the same color and taste as compared with the taste of 'Coca-Cola'. I have never seen a cola beverage not the same general color. I have never tasted a cola beverage that did not have the same general taste." (Rec., 1074). * * *

E. D. MONTGOMERY, manager of the Eastern Division, Southern Bell Telephone Co., Birmingham, (Rec., 1362-3):

"I do not know how many there is, really there is a number of drinks of that class. Those drinks look alike and taste alike. (Rec., 1362). * * * There are four or five of those drinks you could set out and I could not tell you the difference to save my life, just which is which." (Rec., 1363).

7.

Admissions of Plaintiff's Witnesses.

DR. CHARLES E. CASPARI, St. Louis, Mo. (Rec., 901-2):

"I have had experience, also, examining products that are similar in appearance to 'Coca-Cola', and have analyzed *three hundred* samples of such products."

DR. H. B. FULLER, plaintiff's chief chemist, Washington, D. C. (Rec., 2266):

"I have made in the neighborhood of 1500 analytical examinations of other beverages of the kind and character of 'Coca-Cola'."

R. W. BROWN, soda water business, New Orleans, La.:

"There is a bunch of drinks on the market similar to 'Coca-Cola'. I do not recollect the names of all of them, but there are quite a number of them. I think there is one called 'Cola-Ade." (Rec., 682).

EDWARD T. LAGAN, owner of a lunch room, formerly a drug clerk, Chicago:

"Yes, sir, I have dispensed some of the other cola drinks. I have dispensed 'Lime Juice and Cola', and

'Cola-Mint'. * * * That has been on the fountain right along for the last ten years. Yes, it is the same color as 'Coca-Cola'. I have handled it and know that it has been on the market for the last ten years. It is made by Parke-Davis & Company, of Detroit. (Rec., 896). * * * I have handled at the fountains and places where I have dispensed drinks both root beer and sarsaparilla. * * * They are the same general color as 'Coca-Cola', and it would be hard to distinguish between them and 'Coca-Cola'. * * * They are all dark. There are so many other drinks which I have dispensed at my fountain of that dark color that I really could not begin to tell you how many of them I have dispensed. Almost all of the drinks are dark, * * * that is the general color for drinks at soda fountains,—just about,—dark and red and brown." (Rec., 896-897).

F. C. PEACE, an ex-Pinkerton detective, employed by plaintiff as a detective in this case (Rec., 2205-6, 2217-8):

"No, sir, I cannot tell the difference between 'Coca-Cola' and other drinks on the market. I know of probably ten other drinks on the market that are similar to 'Coca-Cola'. * * * I have seen 'Ko-Nut', 'Rye-Ola', 'Wise-Ola', 'Ala-Cola', 'Lemon-Cola', 'Chero-Cola', 'Celery-Cola', 'My-Cola', 'Moxie', and sarsaparilla, and this dark colored creme soda. *** These drinks are all similar in color to 'Coca-Cola.' I have also heard of 'Star-Cola', 'Luck-Ola', 'Glee-Nol', and 'Tru-Cola', but I have never seen those drinks. (Rec., 2205-6). No, sir, I can not tell the difference in taste between 'Coca-Cola' and these other cola drinks on the market. * * * The stuff that the Southern Koke Co. make at New Orleans that they call 'Dope' and 'Koke', I could not tell the difference between that and 'Coca-Cola'. * * * 'Ko-Nut' is another one that is hard. * * * 'My-Coca'

tastes very much like 'Coca-Cola', I cannot tell the difference. * * * 'Rye-Ola' and 'Wise-Ola', I think, are very much like 'Coca-Cola'. * * * So many of these various cola drinks taste so much like 'Coca-Cola' that I cannot tell the difference." (Rec., 2217-18).

H. B. PIERCE, chief detective of the Coca-Cola Co. (Rec., 2132):

"I do not know, and have no idea, how many cola drinks there are on the market. I know of possibly fifteen or twenty. * * * All of these cola drinks I have known of all have about the same color, and are put up in the same kind of bottle, and have pretty much the same general taste." (Rec., 2132).

C. C. ROSS, one of plaintiff's numerous spotters (Rec., 2174, 2176):

"Yes, sir, I have seen bottles containing other cola drinks. * * * I have seen a great many cola drinks,—I have seen several of them, for instance, 'Chero-Cola', 'My-Cola', 'Parafait', 'Chas.-Cola', 'Epps-Cola', 'Rivo-Cola'. I could study up some more, but that is all I can think of right now. (Rec., 2174). * * * If they put sarsaparilla in 'Coca-Cola' bottles I do not expect I could tell it by looking at it. Yes, sir, I have seen other drinks similar in color to 'Coca-Cola' in bottles,—'My-Cola', and the others I named awhile ago. I cannot say that I have seen any other drinks, other than cola drinks, which are similar in color to 'Coca-Cola'." (Rec., 2176).

NORVELL N. LEAVER, manufacturer of "Orin-Cola", St. Louis, Mo. (Rec., 2036-7):

"I put out a drink known as 'Orin-Cola'. That is a drink similar to 'Coca-Cola'. * * * It looks like

'Coca-Cola'. It is colored the same as 'Coca-Cola'. *** I colored my drink the color of 'Coca-Cola' for the simple reason that it is customary among the trade. * * * It is the custom, from experience, when people ask for lemon soda you have to have a white soda, and, if they ask for sarsaparilla, it is black; if they ask for 'Dr. Pepper', it is black; and we color them for that simple reason, I suppose. . . . it the flavor it has because people like flavor of tha. kind."

JOHN H. BOHNE, an employee of the Liquid Carbonic Company, St. Louis, Missouri, formerly in partnership with Norvell N. Leaver in the manufacture of "Orin-Cola" (Rec., 2045):

"After I left Mayfield, I went in partnership with him [Norvell N. Leaver] in 1904, in the manufacture and sale of a drink called 'Orin-Cola'. * * * The color of 'Orin-Cola' was a brown color, like the usual cola drinks. Most all of the cola drinks I ever saw are about the same color. I never saw any difference in them, so far as the color is concerned. Burnt sugar produces that color. * * * My understanding of the thing is that any drinks that would be called under the name of cola usually have the same color." (Rec., 2045).

T. J. HAIZLIP, a retail druggist, Fort Worth, Texas (Rec., 1962-3):

"I have never tried to dispense any of the other beverages, but I have drank it at the other soda fountains. (Rec., 1962). * * * The other products are very similar to Coca-Cola, if I understand it correctly. In other words, personally, I cannot tell the difference between them." (Rec., 1963).

J. M. PENLAND, a wholesale druggist, Waco, Texas:

"Yes, I am acquainted with the fact that there are various drinks on the market similar to 'Coca-Cola', I know that there is. (Rec., 1980). * * * The drink known as 'Dr. Pepper' is still being sold in Waco. I do not know how long it has been on the market, but I have known of it fifteen or eighteen years." (Rec., 1983).

DAVE S. BAUER, retail druggist, Mobile, Ala.:

"Yes sir, I have heard people ask for cola beverages besides 'Coca-Cola'. I have heard them ask for 'Gay-Ola', and for 'Carre-Cola',—that last is manufactured in Mobile by D. Carre Company, I do not think of any other. 'Carre Cola' is the same color as 'Coca-Cola'. I do not know whether or not there are as many as 150 cola beverages on the market, but I say I know of some of the 150, meaning thereby a large number. I have no idea how many I know of. All of those that have come under my observation are of the same color as 'Coca-Cola'. I could not tell you whether or not they all taste similar to Coca-Cola, because I have never tasted any except the 'Carre-Cola'. (Rec., 541-542). * * * I understand you to mean by cola drink, a drink that is similar in color, taste, and appearance to 'Coca-Cola'. Any recognized cola drinks, or any that have been advertised, are the only ones I have heard the public call for. I know there are quite a number of them, among which are 'Afri-Cola' and 'Gay-Ola'. * * * I have also heard the public ask for 'Lame-Cola'. That is a soda fountain drink put up by Parke-Davis & Co., of Detroit. (Rec., 542). *** I do not believe I could tell you the difference between it and 'Coca-Cola' in color." (Rec., 543).

G. H. UPCHURCH, president and manager of the Bienville Pharmacy, Mobile, Ala.:

"The color of these other cola beverages which I

saw was similar to 'Coca-Cola'—they are similar in color to 'Coca-Cola'. It is pretty hard for me to recall right at the present time the different cola beverages I have seen which are similar in color to 'Coca-Cola'. I have seen samples of 'Afri-Cola', and of 'Dope' and 'Koke', and I have seen samples of others which I cannot recall at the present time, one was made in Birmingham, I think, that I have seeen samples of, but I do not remember the name of it. I do not know whether it was 'Rye-Ola' or not, I think that was the name. I have seen samples of 'Wise-Ola'. That is made at another place, I do not know whether that is made at Birmingham, or not, but I have seen samples of it." (Rec., 526).

T. M. MURPHY, a detective in the employ of the Coca-Cola Company:

"Well, I have no first hand knowledge as to how many concerns there are making drinks similar to 'Coca-Cola', but what knowledge I have was gotten at a picture show at Camden, Ark. I saw an advertisement stating there were 156'.' (Rec., 509).

F. M. GREEN, a retail druggist, Atlanta, Georgia:

"I do not know how long I have been handling 'Hires' root beer, but it has been ten or twelve years, though, any way. Yes, sir, we handled root beer before that, the one that we made ourselves. * * * The color of the sarsaparilla we handled was a brown color. (Rec., 452). * * * I have seen 'Moxie', and that is a deep brown color. *** Root beer and sarsaparilla are colored with caramel. (Rec., 453). * * * I know a number of drinks on the market today of substantially the same color, taste, and appearance as 'Coca-Cola'. (Rec., 454). * * * I do not know how many such drinks there are on the market. There might be a dozen, I do not know." (Rec., 455).

LINTON L. STEPHENS, soda dispenser and cigar clerk, Atlanta, Ga.:

> "I have seen several drinks on the market similar to 'Coca-Cola'—'Ko-Nut', 'Afri-Cola', 'Kola-Ade', 'Ko-Nut' looks like something similar to 'Coca-Cola' and root beer. I do not know that I have ever tasted it." (Rec., 486).

J. W. HUGGINS, a Coca-Cola bottler, Murfreesboro, Tennessee, who formerly bottled a product which he labeled Koke:

> "The first product we bottled and labeled 'Koke' was, I think, 'Nerve-Ola', but we have bottled several different things that we branded 'Koke'—several of these different cola drinks. What we got from the 'Nerve-Ola' people was the completed syrup. It looked like 'Coca-Cola', and tasted pretty much like 'Coca-Cola'." (Rec., 2012-2013).

GEORGE J. MARTIN, traveling salesman for the Coca-Cola Company:

> "Yes, in my experience as a traveling man visiting drug stores and soda fountains over the country I have observed other beverages dispensed from soda fountains of a similar color to 'Coca-Cola'. 'Koke' and 'Dope',—it has a similar color to 'Coca-Cola'. 'Gay-Ola' has a similar color, and I have seen several substitutes on the market that had a similar color. (Rec., 342). * * * I have seen a product on the market known as 'Afri-Cola'. That's a similar color to 'Coca-Cola'." (Rec., 343).

ASA G. CANDLER:

> "Oh, yes, there is a drink called 'Afri-cola'. I have heard of it frequently. Yes, sir, I think I have

seen it—I know I have. It is about as near the color of 'Coca-Cola' as they could get it. (Rec., 383). *** Yes, sir, there is a 'Ko-Nut'—that is run by the same gang, I think. * * * I understand that Hagan & Dodd make 'Afri-Cola' and 'Ko-Nut'. I do not know, but I think they have been making it ten or twelve years." (Rec., 384).

CHARLES HOWARD CANDLER:

"Yes, sir, I know the firm of Hagan & Dodd. *** Yes, sir, they have made a drink called 'Ko-Nut'. * * * I have not seen much of the 'Ko-Nut' for three or four years, I do not think. * * * No, I do not know how many soft drinks there are on the market today that are about the same color as 'Coca-Cola'—that same general line of color—caffeine or cola drink. I never thought of it." (Rec., 398).

DAVID G. WISE, a retail druggist, Atlanta, Ga.:

"Yes, sir, I have seen 'Afri-Cola'. Why, I do not know how long I have known it, five or six years, I think. It was brought to me and offered for sale. It looked like 'Coca-Cola'. *** It tasted, of course, to a certain extent, like 'Coca-Cola'. * * * There is a similarity. (Rec., 475-476).

CHARLES KINGSBERRY, in the cigar and soda water business, Atlanta, Georgia:

"You ask if I know any other soda fountain drinks of the same color as 'Coca-Cola'; why, 'Coca-Cola' looks something like the color of root beer, I suppose, and sarsaparilla. * * * Root beer and sarsaparilla are the only other drinks that I have ever seen that have that color. * * * I have seen 'Ko-Nut'—I used to drink it at the ball park when I could not get 'Coca-Cola', years ago. The color of 'Ko-Nut' is something like the color of 'Coca-Cola'.

* * * Yes, sir, it is pretty close to 'Coca-Cola'." (Rec., 467).

PETE VERGE, soda water and cigar business, Atlanta, Georgia:

> "There used to be a Nova-Cola Company that made 'Nova-Cola', located on Mitchell Street across to my place. They used to be in Rome, Ga., and I think they are there now, if I am not mistaken. The color of it was the 'Coca-Cola' color. * * * It looked like 'Coca-Cola', of course, the color." (Rec., 490).

W. L. SAMS, traveling salesman of the Coca-Cola Company:

> "Yes, sir, I have seen 'Moxie' and it is similar in color to sarsaparilla and root beer." (Rec., 337).

NICK D. CHOTAS, in the cigar and soda water business, Atlanta, Ga.:

> "I dispense at my soda fountain, besides 'Coca-Cola', * * * 'Hires' root beer', * * * The color of the root beer which I dispense is black—well, very like 'Coca-Cola'. * * * 'Hires' root beer is more like 'Coca-Cola', more the color of 'Coca-Cola'. Well, I do not know whether or not it would be very hard, or, in fact, impossible, unless you made a very careful examination of the two colors together, to tell whether a drink was 'Coca-Cola' or 'Hires' root beer,—by the color you can't." (Rec., 448-449).

GEORGE ALFRED HARBOUR, proprietor of Harbour's Smoke House, Atlanta, Georgia:

> "Well, yes, I have seen other drinks on the market similar to 'Coca-Cola' in color; you might say

'Hires' root beer is similar to a certain extent in color." (Rec., 458).

I. L. JAMES, a retail druggist, Atlanta, Georgia:

"You ask what other drinks are on the market that are similar to 'Coca-Cola' in color. Well, root beer resembles 'Coca-Cola', foams a little more, and sarsaparilla—of course, sarsaparilla and root beer are similar. * * * Yes, sir, I have made root beer myself. Why, we colored it with burnt sugar,—caramel,—if we colored it at all. * * * Well, I do not know what is the difference in color between a glass of root beer or a glass of sarsaparilla as served at a soda fountain and a glass of 'Coca-Cola'. 'Coca-Cola' might be a shade lighter, I don't know. Yes, sir, it is very hard to tell the difference. No,I do not think the ordinary customer, coming in, if he saw a glass of one and a glass of the other sitting on the counter, could tell the difference between them." (Rec., 461-462).

JOHN MEHOS, in the cigar, soda fountain, and restaurant business, Atlanta, Georgia:

"You ask if I have handled anything else beside 'Coca-Cola of that same color since I have been in business in Atlanta; root beer, you know, and sarsaparilla are drinks of that color." (Rec., 512).

T. C. LUPTON, manager of the Coca-Cola Bottling Works, Dallas, Texas:

"We bottled 'Iron Brew' last year. * * * No, sir, it is not a 'Coca-Cola' product. Yes, sir, we did put it up in 'Coca-Cola' bottles. (Rec., 778). * * * Iron Brew is about the color of 'Coca-Cola'." (Rec., 779).

A. B. FREEMAN, manager of the Coca-Cola bottling plant, New Orleans, La.:

> "Q.—I asked you, 'Isn't it true that you, yourself, bottled "Grapine" and sarsaparilla in your "Coca-Cola" bottles? You answered, "We have not bottled any other things in them for the last two and a half or three years"; that is the correct answer, wasn't it? A.—Yes, sir, and I reiterate that. And that meant that I had bottled other things anterior to the last two and a half to three years, and the qualificaion as to 'Grapine' that I now make is that we put sarsaparilla in such bottles and not 'Grapine', because it was not then on the market. My recollection is that 'Grapine' was first put on the market at the beginning of last year—possibly last fall. That is not a 'Coca-Cola' product. That is put up by the William A. Abbott Co., of Los Angeles. It has about the same shade of color as sarsaparilla and 'Coca-Cola'. * * * It is about the same general appearance and color." (Rec., 644).

SCHEDULE VIII.

The Soda Water Bottle.

1.

Physical Exhibits.

The best evidence that the size, color, shape, design and general appearance of the soda water bottles used by plaintiff for bottling the several beverages made from its syrup do not in any wise serve to identify or distinguish plaintiff's bottles from the bottles containing the similar products of others, is the bottles themselves in which the various brands of soda water are

marketed. See *Defendants' Exhibits 1, 2, 3, 4, 6, 43* to *54* inclusive, *189* to *213* inclusive, *215* to *223* inclusive; *plaintiff's exhibits 153* to *160*, inclusive, *187*, *188* and *191*; and *plaintiff's rebuttal exhibits 68* to *77*, inclusive.

2.

Testimony of Defendants' Witnesses.

HENRY BOERGER, president of the Chattanooga Bottling Works, Chattanooga (Rec., 967-8):

> "When I first bottled 'Coca-Cola' we used the Hutcheson stopper, that is a different shaped bottle, but for the last ten years we have been using the crown stoppered bottle nearly altogether. The crown stopper bottle we have been using is the same shaped bottle as other drinks are put up in. * * * I would not know a bottle of 'Coca-Cola' if I saw it, by the color, shape or size, although some bottles are a different size from the 'Coca-Cola' bottle. *** There are lots of other bottles that have the same shape as 'Coca-Cola'."

LEE HAGAN, of Hagan & Dodd, manufacturers of Ko-Nut and Afri-Cola, Atlanta (Rec., 1297):

> "Prior to the time I bottled 'Ko-Nut', I bottled 'Dixie'; that was put up in the old Hutcheson stopper bottle, before the crown bottle came in use. The crown bottle came in use about fourteen years ago, I think, here in Atlanta. A good many bottles have a special shape of their own, but the bottle used by the 'Coca-Cola' people at this time is very similar to the soda bottle used twenty-five years ago by all bottlers for bottling a general line of soda water."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola", Nashville (Rec., 1093):

"I do not think I ever saw a [cola] beverage not put up in a bottle of the same general appearance and size as the one in which 'Coca-Cola' is put up. Those bottles, the color and taste of the drink, are common to the trade."

J. C. McDONALD, a bartender, Chattanooga (Rec., 1068):

"I have never seen a cola drink not practically the same color as Coca-Cola and practically the same taste, or that was not put up in a bottle of the same general design as the 'Coca-Cola' bottle."

A. W. STANLEY, proprietor Stag Hotel and Bar, Chattanooga (Rec., 1004):

"These drinks were put up in bottles. They were all about the same, all black bottles. I cannot distinguish a 'Coca-Cola' bottle from a bottle of these other cola drinks that I know of, unless I saw more than that, the *name blown in the glass.* * * * My recollection is that they are all about the same kind of bottle."

JOE QUINN, a bartender, Chattanooga (Rec., 991-2):

"All the different drinks I have handled and know of have been bottled. The bottles all look the same. I do not know that I could tell one from the other. I could not distinguish a bottle of 'Coca-Cola', *without the crown on it.*"

TOM COLLINS, steward of the Eagles' Club, Chattanooga (Rec., 988-9):

"If I saw a bottle of 'Coca-Cola' sitting on the counter, from the size of the bottle, the color, shape,

and general appearance of the bottle, I could not tell whether or not it was a bottle of 'Coca-Cola' or a bottle containing some other cola beverage. The bottles look about the same to me, that, is the 'Coca-Cola' bottles and the cola bottles."

A. F. ENSINGER, a bartender, Chattanooga (Rec., 985):

"The bottles of the different soft drinks I handle, compare, as to size, general appearance, etc., with the bottles in which 'Coca-Cola' is put up, are all pretty much the same shaped bottle and color. *** I would not know a bottle of 'Coca-Cola' by its *size, shape, color,* or its *general appearance, unless* I saw the *name* on it. The majority of bottles are all pretty much the same size, shape, and color, and I could not distinguish them *unless I had seen the name.*"

E. W. FREEMAN, a bartender, Chattanooga (Rec., 974-6):

"I would not know a bottle of 'Coca-Cola' by its *size, shape,* and *general appearance, unless it had 'Coca-Cola' blown in it,* or something like that. (Rec., 974). * * * I have never seen a cola beverage that was not the same general color of 'Coca-Cola'. They generally taste about alike to me, and are put up in the same general style of bottle, color and all." (Rec., 975-6).

J. N. WHEELER, a bartender, Chattanooga (Rec., 970, 972):

"The size, shape, and general appearance, etc., of the bottles that these other cola beverages are put up in, compared with the 'Coca-Cola' bottle, are very much the same thing. (Rec., 970). * * * I

would not know a bottle of 'Coca-Cola' if I saw it, and *did not see the name of 'Coca-Cola' on the side of the bottle.* It is pretty much the same bottle as the other cola drinks, the same shape, and, *if you do not see the lettering on it,* I do not suppose you could tell the difference. * * * The size, shape and general appearance of the 'Koke' bottle used compare pretty much the same with those used generally in the trade for other cola beverages." (Rec., 972).

M. J. COSTELLO, a bartender, Chattanooga (Rec., 1000):

"All cola drinks I have known of have been put up in bottles. The shape, size, and general design and appearance of the bottles of these other cola drinks, compared with the bottles of 'Coca-Cola' are pretty much alike, there is very little difference in any of them. * * * I could not distinguish a bottle of 'Coca-Cola' from these other drinks, *unless I saw the crown,* or *name blown in the side of the bottle.*"

W. F. STRICKLAND, a bartender, Chattanooga (Rec., 1048-9):

"These drinks are put up in bottles. The general size, shape, and appearance of the 'Maud Muller' bottle and this Zimmerman stuff I spoke of, as compared to the size, shape, and general appearance of 'Coca-Cola' bottles, all look about alike, sometimes the bottlers would blow their names around the top. (Rec., 1048). * * * Some of the bottles have a name in them, like *'Chattanooga Bottling Company,'* but you have to get up close to read them. They are all the same size and *** look like a 'Coca-Cola' bottle. The 'Coca-Cola' bottle has *'Coca-Cola Bottling Company' on it.* I believe it is on the bottom, *'Trade-Mark Registered'* or something like

that, great big '*Coca*' and another big '*C*', and the rest of the letters small."

LUKE POGUE, a bartender, Patten Hotel bar, Chattanooga (Rec., 1060-1):

"The *name* '*Coca-Cola*' is on the 'Coca-Cola' bottle. Some of the others have names on the bottles and some do not. There is no way for our customers to know, when they come and ask for a 'dope', the drink they are getting without it is 'Coca-Cola'. 'Coca-Cola' uses their own bottles, and these other coke companies, most of them use bottles they pick up, almost all of them, and you might get a case with a dozen different names on the bottles."

W. F. BOYLIN, president of the American Label Works, Nashville, (Rec., 1075-6):

"I do not think I have seen cola beverages put in anything except six and seven ounce split bottles. Most all I have ever noticed are dark brown bottles."

F. E. HOOPER, a retail grocer, Chattanooga (Rec., 997):

"These cola drinks all pretty much the same color as 'Coca-Cola', all in dark bottles, and look alike. * * * They are dark bottles pretty near the same size, and pretty nearly the same as the 'Coca-Cola' bottles."

CHARLES W. BURTON, a lunchroom proprietor, formerly a bar tender, Birmingham (Rec., 1324):

"The bottles of these different cola drinks have a similarity, all about the same size, round, and I have seen them, as I say, in both clear and amber bottles, just one way and then another. In fact, I have seen mixed cases of bottles, the bottles being mixed in the case."

H. L. FISHER, engaged in the wholesale liquor business, Birmingham (Rec., 1346):

"These cola drinks are all labeled—most of them have the *name on the cap.*"

C. N. BAKER, a bottler, Newman, Georgia (Rec., 1407):

"There is no difference in the bottles of these different drinks, any way, *except the name blown on them.*

3.

Admissions of Plaintiff's Witnesses.

CHARLES HOWARD CANDLER, vice-president and general manager of the Coca-Cola Co. (Rec., 396):

"The Coca-Cola Co. first began to make bottling syrup in 1898, and that is when 'Coca-Cola' first began to be bottled."

H. B. PIERCE, chief detective for the Coca-Cola Co., in charge of working up the facts in this case (Rec., 2136, 2141):

"Sure, I know a 'Coca-Cola' bottle when I see it. No, *it is not a distinctive bottle.* No, *it is not distinctive.* No, *'Coca-Cola' hasn't a distinctive bottle,* not

in its present form,—it is distinctive in as much as it has the *trade-mark 'Coca-Cola* blown in script in some part of the bottle, and *that is the thing that distinguishes it from all the other bottles on the market*—not *all* the bottles, there are *some* bottles that have a *different* size and shape. (Rec., 2136). * * * You ask if there is any way of telling, from the size, shape, color, design, and general appearance of the bottle, whether or not it contains 'Coca-Cola', or one of these fourteen or fifteen drinks which I have mentioned; the licensed bottlers of 'Coca-Cola' always use the *trade-marked* 'Coca-Cola' bottles, and *that is the way I distinguish those from the other drinks.*" (Rec., 2141).

GEORGE H. WILKINS, private detective from the office of Edward S. Rogers, Esq., Chicago (Rec., 887, 888, 885):

"You ask if I don't know that the bottle marked *plaintiff's exhibit No. 187, a* bottle of 'Koke'] is about the same size and shape bottle that is used generally in the trade, in the soft drink business, for nearly every kind of carbonated soft drink that is on the market; well, no, I could not testify as to that. I don't know what bottles they have used. Until I work on a case I do not pay much attention to the exact type and size of bottles. But I know these bottles, 'Coca-Cola' and 'Koke', are about the same as a great many bottles I have seen that do not contain 'Coca-Cola' and 'Koke'. (Rec., 887). *** Most of the soft drinks I got at Fort Worth, Dallas, and New Orleans were in this general style of bottle, but I do not know them as being 'Coca-Cola' bottles. It is a bottle similar to this bottle, *Exhibit No. 187.* No, *I do not believe I could tell, from the shape of the bottle, what was in it.* (Rec., 888). * * * Of course, I do not know of my own knowledge who bottled these products [Plaintiff's exhibits 187, 188, 189, and 191], only by [the] *labels* on *the bottles.*" (Rec., 885).

C. C. ROSS, one of plaintiff's investigators (Rec., 2174-6):

> "You ask how I know that the bottles which we got at the three drug stores mentioned were bottled 'Coca-Cola'; well they were *labeled 'Coca-Cola'*, and had *Crowns* on them *'Coca-Cola'*, and *'Coca-Cola' was blown into the bottles.* Yes, sir, I have seen bottles containing other cola drinks. You ask what cola drinks; well, I have seen a great many cola drinks—I have seen several of them, for instance, 'Chero-Cola', 'My-Coca', 'Parafait', 'Chas.-Cola', 'Eps-Cola', 'Rivo-Cola'. I could study up some more, but that is all I can think of right now. * * * No, I cannot distinguish 'Coca-Cola' from the *bottles* in which these other drinks [are bottled]. I cannot tell it by the *color*. * * * If they put out sarsaparilla in 'Coca-Cola' bottles I do not expect I could tell it by looking at it. (Rec., 2174-2175-2176). * * * You ask if the 'Coca-Cola' bottles are uniform; some places they use a bottle like that (indicating a flint bottle) and in some places they use a dark bottle or brown bottle. * * * In Nashville, I believe, it is a brown bottle. Then, there is a kind of blue bottle, some of them have in some places." (Rec., 2175-6).

NORVILLE N. LEAVER, manufacturer of "Orin-Cola", St. Louis, Mo. (Rec., 2037):

> "Some 'Coca-Cola' has blue glass bottles, green glass, rather, and it is a little bit smaller on the top than mine. * * * In my experience there is half a dozen styles on the market in the City of St. Louis." (Rec., 2037).

SAMUEL C. DOBBS, vice-president and sales manager of the Coca-Cola Co. (Rec., 323-4):

> "I have seen 'Coca-Cola' bottled in eight ounce bottles and in seven ounce bottles. * * * When it

originally started the bottles held about eight ounces, but they have been gradually eliminated,—we have been gradually eliminating that. We had lots to learn when we started the bottling business. For the past several years the 'Coca-Cola' bottles have all been tending toward that particular shape. Oh, there have been differences in the shape in the past, yes, and it is still sold in bottles of different shapes. * * * Some of the bottling plants are using the amber bottles, but the proportion of them is comparatively small, and it is a thing we have objected to and are rapidly getting cleaned out. * * * It was not in 1911, I think it was later,—I don't recollect now,—but there was a meeting of the Coca-Cola bottlers held here in Atlanta to adopt a uniform bottle. * * * The reason we wanted a uniform bottle was to protect ourselves against infringements. There would never have been any necessity to adopt a uniform bottle if they had all been uniform before that."

A. B. FREEMAN, manager of the Coca-Cola Bottling Co., New Orleans, La. (Rec., 642-5):

"Mr. Hirsch asked me, as I understood the question, if *plaintiff's exhibit 111* *** was a 'Coca-Cola' bottle. I replied that it was, *** as used by us. (Rec., 642). * * * Up to the time of the 1911 convention that bottle had not been adopted. You ask if I did not testify in the *'Glee-Nol' case* that a bottle of that general shape and make had been generally used for various drinks, and that I, myself, had bottled 'Grapine' in such a bottle, and you say that you showed me a bottle, if I will recollect; I could not have testified that positively, Mr. Dart, because that particular bottle was a result of this conference between the bottlers and the Coca-Cola Co. that you refer to—that bottle was not in existence beforehand. Yes, sir, it is true that a bottle bearing the label 'Coca-Cola' had been generally used by our

bottling company, anterior to the convention of bottlers which I speak of in 1911, for bottling other drinks than 'Coca-Cola', but not that particular bottle, because that particular form and shape of bottle was adopted by that convention. * * * You say you showed me a bottle of 'Grapine' during the *'Glee-Nol'* trial, bottled in a bottle exactly like this, and ask me if I do not remember it; I do not recollect that particular bottle. I do not say that you did not, there were quite a number of bottles shown me for identification. * * * It [Grapine] is about the same shade of color as sarsaparilla and 'Coca-Cola' * * * it has about the same general appearance and color. Anterior to this convention of bottlers that I speak of, the 'Coca-Cola' bottle had the trade-mark blown in all over the bottle in various positions, that is, there was no particular place where they blew in the name 'Coca-Cola'. The trade-mark itself was uniform, but it was not uniformly blown in the same place on every bottle. (Rec., 643-4). * * * Yes, sir, you exhibited a number of bottles to me and I recognized them as *various types* of 'Coca-Cola' bottles that were used prior to the adoption of the standard bottle." (Rec., 645).

T. C. LUPTON, manager of the Coca-Cola Bottling Co., Dallas, Texas, (Rec., 786-7):

"You ask if the bottle which you hold in your hand, *plaintiff's exhibit 153*, is a 'Coca-Cola' bottle; no, sir, that is a soda water bottle.

"Q.—Then, what you meant was—when you answered my previous question about 'Brew' being in 'Coca-Cola' bottles—you meant in a bottle which contained the trade-mark blown on the shoulder of the bottle? A.—That is right, Judge.

"You say that nobody would mistake the bottle which you hold in your hand (exhibit 153) for a 'Coca-Cola' bottle; well, Judge, some people, you

know, could be mistaken in it, it is the *size* of the 'Coca-Cola' bottle, but it has not the *trade-mark*. No, sir, the bottle you hold in your hand is not a 'Coca-Cola' bottle except for the fact that the word 'Coca-Cola' is not blown on the shoulder. No, sir, it is not like a 'Coca-Cola' bottle. You ask how it *differs* from a 'Coca-Cola' bottle—well, Judge, it is a little bit taller, it is built a little bit different from 'Coca-Cola' bottles. You ask me, then, how it is that I say people would *mistake* this *exhibit No. 153* for a *'Coca-Cola' bottle;* well, they hold the same, Judge, they hold the same amount.

"Q.—I asked you why you swore that that bottle, No. 153, not being a *'Coca-Cola' bottle*, could ever be *mistaken* for a *'Coca-Cola' bottle;* why did you swear that? A.—Well, Judge, *they could be mistaken*, according to my judgment, because the *'C-C's'* on it, they would take that for a 'Coca-Cola' bottle,—could do it, couldn't they?

"You ask who would; I say, anybody drinking it, it is about the *shape* of the 'Coca-Cola' bottle. I believe, Judge, that *anybody* looking at that bottle, No. 153, *would be liable to take it for a 'Coca-Cola' bottle.*

Q. In other words, *it would take an expert like you*—A. No.

"Q. *To pick out a 'Coca-Cola' bottle from one of the soda water bottles?* A. *Yes, it is hard, Judge, it is hard, no doubt about that.*

"Q. About as hard a task as sorting out black-eyed peas one from another? A. I did not say black-eyed peas, but *it is a hard job.*" (Rec., 786-787).

SCHEDULE IX.

The Dispensing Bottle.

J. A. HODGE, manager of the Illinois Glass Co., Dallas, Texas (Rec., 1756-8):

> *"Defendants' exhibit* 223 is a stock bottle that we carry in stock. It is not a special design made for any particular concern; it is what we call a machine made dispensing bottle, the only form of the kind we have. We had never sold that to the Coca-Cola Co. We sold to the Jersey Creme Co. in Fort Worth, and Hughes Bros., in Dallas, A. M. Brown in Dallas and sold to the various decorators for stock packages. Some of the decorations that have been on there were: "Tru-Cola', for Hughes Bros.; 'Koke', for the Koke Co.; 'Howel's Orange Juice' and 'Grape Juice' for the Jersey Creme Co. That is the cheapest thing we have. We sold some of these bottles to the Koke Co. of Texas. I have a copy here of our invoice the only one we ever entered, one bill which went forward from the house on June 16, 1913. *Defendants' exhibit* 224 is a carbon copy of the bill sent over at the time the shipment was made. *** *Defendants' exhibit* 225 is the bottle we sold the Koke Company of Texas. There is a mark on the bottle showing it is an automatic machine made bottle, the peculiar mark at the end of the glass where it is cut off. The automatic machine makes that mark on every bottle, and no other kind of bottle has that mark on it. * * * He [the representative of the Koke Company of Texas] told me he was getting up this company and was going to use a bottle. * * * He did not tell me anything about any particular design, just the cheapest thing we had, and this, as a matter of fact, is the cheapest. We formerly made this bottle up by hand, and it ran as high as $18.00 a gross, and then, when we made it by machine, machine made bottle it took off 33 1-3

per cent in price. * * * The other styles are more expensive than those; they are hand made."

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1635):

"A dispensing bottle marked *defendants' exhibit* 173 is a sample of the dispensing bottle purchased by us and used by the Koke Companies, that was furnished dealers. I did not pick out the design of dispensing bottle, just sent them, that is, the local representative of the Illinois Glass Works here, gave him my label and told him I wanted a dispensing bottle, one of their regular stock bottles, and wanted my 'Koke' on there ,and that is the bottle they shipped me. That is the cheapest bottle they had."

C. H. JOUETT, associated with the Live & Let Live Drug Co., Chattanooga, but formerly drug clerk at the Miller Pharmacy, Chattanooga (Rec., 1052-3):

"At the Miller Pharmacy the syrups for the different drinks they had were kept in dispensing bottles, tanks and pump jars. * * * They [the dispensing bottles] were all the *same shaped*, but they were *labeled* so we would know them one from the other." (Rec., 1052-1053).

GEORGE H. WILKINS, the private detective from the office of Edward S. Rogers, Esq., in referring to one of defendants' dispensing bottles which he saw in the office of J. H. Van Winkle, the manager of the Koke Company of Texas, said (Rec., 873):

"I saw a bottle standing on Mr. Van Winkle's desk which was *the ordinary type of dispensing bottle commonly used at soda fountains.* * * * On

the face of the bottle, blown in on the label, was the word, 'KOKE',—'K-O-K-E'."

There is no evidence the other way.

The only testimony plaintiff has produced with respect to dispensing bottles at all, is as follows:

SAMUEL C. DOBBS (Rec., 319-20):

"The Coca-Cola Company furnishes dispensing bottles, a sample of one of which is shown by Exhibit 59."

SCHEDULE X.

The Attack Upon J. C. Mayfield.

Plaintiff says Mayfield was not making "Koke" in Birmingham in 1905 and 1906, because, in a letter to Pogue, he used the phrase, "Celery-Cola" is my all." If the phrase were entitled to the force which plaintiff attributes to it, then it would mean that Mayfield was then making nothing but "Celery-Cola". The truth is, however, as admitted by numerous witnesses for the plaintiff, that Mayfield and his companies at that time were *making numerous soda water flavors, besides selling vinegar, and other products.*

For instance, D. E. Moody says, "We bottled a general line of soda water" (Rec., 1883). B. U. Hopper says he worked for the J. C. Mayfield Mfg. Co., and that he knew of that company, and of the Celery-Cola Co., from 1904 to 1906 (Rec., 1891). He then says: "I don't know just whether I could tell all the soft drinks they manufactured, or not; they manufactured a lot of

soda water extracts and syrups that they sold" (Rec., 1891). W. M. Smith says (Rec., 1893): "The Mayfield Mfg. Co. was engaged in 'Celery- Cola', 'Pepsin-Ola', 'Hop-Ale', cider, and vinegar, and stuff like that." He says he was with the Mayfield Co. from about 1902 to 1907 (Rec., 1893). J. T. Ensley (Rec., 1901) says he worked for the Mayfield Mfg. Co. from about 1900 to about 1906, and that "they put out all the popular flavors, I believe, such as lemon extracts and syrups, vanilla, strawberry, and all the soda water drinks, and 'Vig-O',—a specialty drink,—'Pepsin-Ola', 'Peppo-Ade', 'Celery-Cola'. * * * They also sold different kinds of wine and 'Hop Ale'." Thomas Dickson (Rec., 1907) says: "They were making 'Celery-Cola' and 'Pepsin-Ola' and soda water and such things as that." Tom Anderson (Rec., 1913) says they bottled "Celery-Cola", ginger ale, and all the different soda water flavors.

The statement that "the Government prosecuted Mayfield and associates concerning 'Celery-Cola' (U. S. v. Mayfield, 177 Fed., 765), and, upon conviction for violation of the Food & Drugs Act, the affairs of the Celery-Cola Co. were wound up, the formula for 'Celery-Cola' changed, and the revised product rechristened 'Koke'," is highly misleading.

There were four concerns altogether connected with the sale of "Celery-Cola" in Birmingham. The J. C. Mayfield Mfg. Co., a Tennessee corporation (Rec., 2423) of which J. C. Mayfield was president (Rec., 2423), was the owner of the "Celery-Cola" formula, trade-mark, and business, Mayfield having conveyed the same to that concern upon its organization at Nashville, Tenn., in 1903 (Rec., 2423). The Celery-Cola Company was an Alabama corporation having a license from the

J. C. Mayfield Mfg. Co. giving it the exclusive right to sell "Celery-Cola" at wholesale within certan States (Rec., 2432). Mayfield was also president of this company, and a stockholder therein. The Birmingham Celery-Cola Co. was also an Alabama corporation (U. S. v. Mayfield, 117 Fed., 765). It had a sub-license from the Celery-Cola Company for part of its territory. The Celery-Cola Bottling Co. was still another Alabama corporation (Rec., 1667). It was a bottling concern having the exclusive right to bottle "Celery-Cola" in Birmingham and its suburbs.

It was the *Birmingham* Celery-Cola Co. whose officers and agents were prosecuted in *U. S. v. Mayfield*, 177 Fed. 765. Concerning this case, J. C. Mayfield said (Rec., 1600):

> "A wholesale drug firm in New Orleans ordered a gallon of 'Celery-Cola' syrup. They expressed it to them, and it was carried down through their shipping department, turned over to a chemist, a U. S. chemist, and they reported that they found cocaine in 'Celery-Cola'. I was notified of it. I was out west. I notified my chemist, Van Deusen, about it. Of course, we knew it had no cocaine in it when it left the St. Louis [plant], and we could not account for it. Mr. Van Deusen came on up to New Orleans, and explained here to the chemist that there was no cocaine in our goods, but they contended that they found it in that sample. But we had, up to the time of the passage of the Pure Food Law, and when it took effect, of course used the fluid extract of coca, and we had the goods all over the country in the hands of the bottlers and the fountain men. We tried to get it back. We thought we did have the most of it back. I remember very well of destroying quite a lot of it. But it was found that some of this returned goods was in the plant

there, and they used it. We had two or three ways to account for that; either they used some of the goods made prior to this act going into effect, which had been shipped back, or they had experimented a little themselves, or had been put [it] in after it left the factory. *** I do not believe I was ever a stockholder of record, but they did get a suit against them back there in the court in connection with this sample of 'Celery-Cola' that had cocaine in it, and my name was mentioned in the suit. The other *partners* [parties] who were connected in the business cared nothing about it, because the business had been wound up by the bankrupt court, and there was no defense, is my understanding. In fact, I was never served with a summons, was not present, and presume they just took the shortest and quickest way out of it." (Rec., 1600-1).

After this trial the manufacture and sale of "Celery-Cola" was not discontinued, nor was the use of the name "Celery-Cola" abandoned. The *Birmingham* Celery-Cola" Co., which was merely a licensee of the J. C. Mayfield Mfg. Co., had already been wound up in bankruptcy before the trial took place (Rec., 1601), but the winding up of that concern no more stopped the manufacture and sale of "Celery-Cola" than would the bankruptcy of any other jobber or wholesale dealer wind up the business of any other manufacturer. "Celery-Cola" is still being manufactured and sold by the J. C. Mayfield Mfg. Co. (Rec., 2446). The formula for "Celery-Cola" was not changed after this trial,—which did not occur until *1910 (U. S. v. Mayfield, et al.,* 177 Fed., 765),—it was changed in *1906* upon the passage of the Food & Drugs Act (Rec., 1601). Plaintiff argues that because Mayfield changed the formulas of both "Koke" and "Celery-Cola" at that time, so as to eliminate the cocaine and comply with the law, therefore he was mak-

ing only "Celery-Cola" and not "Koke". "Koke" contains the fluid extract of coca, prior to the passage of the Food & Drugs Act, just as plaintiff's product did, and just as "Celery-Cola" and all the other cola drinks did, and it was as necessary for Mayfield to eliminate the cocaine from "Koke" as it was for him to eliminate it from "Celery-Cola", or for plaintiff to eliminate it from "Coca-Cola".

The assertion that, upon the conviction of the officers of the Birmingham Celery Cola Co., in 1910, Mayfield then changed the formula for "Celery-Cola", and rechristened the revised product "Koke", is pure fiction. On the contrary, it is admitted in the very next breath that Mayfield was making and selling "Koke" in Shreveport, La., at least as early as *June 1st, 1909,* whereas this trial did not take place until *March, 1910.*

Plaintiff argues that, because in four (Plaintiff's Rebuttal Exhibits 85-86, 88, 89), out of twenty-six (Defendants' Exhibits 130 to 155, inclusive) of the applications for State registrations, the printed forms to be filled in used the word "trade-mark" instead of "label" in the space provided for the applicant's declaration as to the length of time "since which" the trade-mark or label had been in use, and that because the date which Mayfield placed in these blank spaces was "June 1st, 1909," therefore he admitted thereby that he had never used the word "Koke" prior thereto. The fact is that, after the Birmingham trial, he got up new labels for both "Celery-Cola" and "Koke" on which the statement was printed in box-car letters, "absolutely free from cocaine!" (See the specimens of labels attached to defendants' Exhibits 130 to 155, inclusive.) Being a layman, he probably thought that a "trade-mark" and a

"label" were the same thing, and as this new design of "Koke" label had not been in use but a short time, he inserted in the applications the length of time since which he had used that particular design of *label*. For instance:

J. C. MAYFIELD (Rec., 2412-2416):

"You hand me Plaintiff's Rebuttal Exhibit 84, and ask me if that is not an exemplified copy of the application which I signed; I was getting them all over the country,—I will say yes. You ask if I did not state in that application the following, referring to 'Koke': 'The same has been in use by applicant since June 1st, 1909;' I will say this, I had reference to this particular label, keg and barrel label I was registering. I had reference to that particular label. I had no reference to the name 'Koke' at all, except that particular label. I attached the label to the application, so I would be on the safe side. You present me with Plaintiff's Exhibit 85, which you say is an application to the Secretary of State of Indiana. * * * You ask if I made this statement in my application, printed on it: 'Length of time, if any, during which trade-mark "Koke" has been in use?' A.—Since June 1st, 1909;' I had attached to my application to that state, as I did in this particular instance, that particular label. My label does not appear on the copy of the application you present me, but it did on the application which I made. I attached it to all of them. * * * That was when I had that particular label made. *I was referring to the label 'Koke'*,—that particular label. You hand me a copy of the application to the State of Massachusetts, marked Plaintiff's Rebuttal Exhibit 86, and ask whether I signed the affidavit in that; well, they have not got my label attached thereto, which I attached to all the different state applications. I will say that copy presented to me is incomplete. You ask if I made this statement: 'Length of time, if any, during which the trade-mark has been in

use? Since June 1st, 1909'; I meant this particular label. I did not mean the *name 'Koke'*, but the *label* that I attached thereto, to every trade-mark I had in each State. * * * You hand me Plaintiff's Rebuttal Exhibit 88, being a copy of the application for the State of California. * * * You ask if I did not swear in that application that: 'This trade-mark consists of 'Koke', a beverage.' This trade-mark has been used in its business since the 1st day of June, 1909; not the trade-mark. I meant this particular *label* that goes on the kegs and barrels. That is what I referred to. The *word* 'Koke' had been in use since 1888. But this *label*, that is when I got this label up and that is what I had reference to. You present me with a copy of an application to the State of Pennsylvania, marked Plaintiff's Rebuttal Exhibit 89. * * * You ask if I did not state in that application: 'The trade-mark consists of the word "Koke"; the length of time, if any, during which it has been in use, fourteen months;' I had attached thereto this particular *label*, as you have got in the preceding one (Plaintiff's Rebuttal Exhibit 84), I had that made,—that is what I had reference to,—but the *word* 'Koke' had been in use in different shapes and different forms for years and years prior thereto, but I had reference to this particular *label*. I was getting State registrations on *labels*."

The majority of the applications had the word "label" instead of the word "trade-mark", and the question asked of the applicant was: "Length of time, if any, since which this *label* has been in use." (See Defendants' Exhibits 130 to 155, inclusive.) These applications were all made at about the same time, and Mayfield probably read a few of them hurriedly, and seeing that the information required in those which he read, was the length of time during which he had used the particular design of *label* which he was required to attach, supposed that all the rest were the same, and filled in the

blank spaces without reading the printed matter. Even if he had noticed that some of them read "trade-mark" instead of "label", that wouldn't have meant anything to him, for he shows in the above extract from his testimony that he didn't know the difference between a "trade-mark" and a "label". Indeed, the person who got up the application blank for the State of Nebraska evidently didn't know the difference either, for, in the application to that state (Plaintiff's Rebuttal Exhibit 87), the printed form reads, "The said trade-mark *or* label has been in use since ....."

Then plaintiff refers to the fact that in 1911 J. C. Mayfield, on behalf of the Koke Company of America, purchased from Christy & Huggins, doing business as the Murfreesboro Bottling Works, the registration of the word "Koke" in the Patent Office which they obtained in 1905, (See Defendants' Exhibit 129) and that later this registration was put in interference with an application of W. L. Bitting, of Sherman, Texas, to register the word "Koke", and that Mayfield, on behalf of the Koke Company of America, bought Bitting's application (See Defendants' Exhibit 128); and plaintiff argues from this that Mayfield had not used the word "Koke" before Christy & Huggins and W. L. Bitting began to use it, "because," plaintiff reasons, if he had, it is unlikely that he would have bought these registrations.

J. C. MAYFIELD (Rec., 1603, 1664, 1674, 1675):

> "That was in 1911. I heard from some traveling men along there that,—I forget just how I got it, there was a firm in Murfreesboro that owned a trade-mark on 'Koke', and [that] I was spending a lot of time and money in building up the business for them. * * * I went to see them and found out

it was true. They were doing a pretty nice business, they said, and showed me their registered trade-mark. I explained to them my long usage. I knew I could win out in the courts, but did not care to do that. They had done some advertising, popularizing my 'Koke', and finally I said, let's see if we can't get together on a business proposition. Well, we did. I bought the 'Koke' for the U. S., except the State of Tennessee (Rec., 1603). * * * I was using that label long before I heard of the Murfreesboro people having a trade-mark (Rec., 1664). * * * W. L. Bitting lived in Sherman, Texas. * * * He had the label registered quite a while, since '98, and the first I paid any attention was when he filed his papers in Washington for a trade-mark based on this registered label (Rec., 1674). * * * Mr. Bitting undertook to change his registered label to a registered trade-mark, and I had the Murfreesboro registration of record in my name, and I received notice of Mr. Bitting's application, and that is where I got hold of it. I got this assignment from Bitting rather than fight it out. My attorney said we could beat it out, and thought it best not to buy it. I said I thought it was the cheapest, quickest, and most satisfactory way. * * * I bought it more to get it out of the way, it was a cloud on my title, and that was the most satisfactory way to get rid of it." (Rec., 1675).

Then plaintiff argues that Mayfield did not use the word "Koke" prior to 1909 because in the license from the Koke Company of America to the Southern Koke Co., Ltd., (Plaintiff's Exhibit 174) it is recited that the Koke Company of America is the owner of a Patent Office registration of the word "Koke", which registration it obtained by purchase from the Murfreesboro Bottling Works. It is not pretended that either Mayfield or the Koke Company of America ever obtained a *registration in the Patent Office* of the word "Koke" until

the Koke Company of America, acting through Mayfield as its president, bought the Murfreesboro registration to remove it as a cloud on his title, which rested therefore solely upon priority of adoption and use.

Then it is said that because Mayfield did not mention his priority of usage in several letters he wrote Christy & Huggins concerning the Bitting interference, but did make the statement that "this party *claimed* priority to right so I understand," therefore Mayfield did not use the word "Koke" prior to 1909. What object could Mayfield have had in telling Christy & Huggins in these letters that *he* had used "Koke" since 1888? Christy & Huggins couldn't testify as to *Mayfield's* use of the word. All they could testify to was *their use,* and Mayfield was inquiring of them as to *their* use, when he learned of the Bitting interference, to ascertain whether or not *their* testimony as to *their* use of the word would be of assistance to him in the then impending fight with Bitting.

Plaintiff evidentyy took its line of reasoning from its bottler, J. W. Huggins, who said (Rec., 2024):

> "It strikes me as being very strange that if he [Mayfield] ever used the word 'Koke' prior to 1911 he would buy it and not mention it to me. No, sir, I am not aware of the fact that prior to the time he called on me he had actually registered the word 'Koke' in every state in the Union. He never mentioned it to me. I think if that had been a fact he would have mentioned it,—I feel certain he would."

As a matter of fact, Mayfield had registered his label, with the word "Koke" on it, in practically every state in the Union *more than a year prior thereto.* (See Defen-

dants' Exhibits 130 to 155, inclusive, and Defendants' Exhibit 156).

Then plaintiff flourishes the "Rice Record" with much gusto. This is a transcript of the evidence in a case tried in 1907 before the police court of Birmingham in which Melville Rice, who had been a book-keeper in the employ of the J. C. Mayfield Mfg. Co. at Birmingham, was prosecuted for grand larceny for stealing the "Celery-Cola" formula (Rec., 2419). Rice was found guilty and bound over to the grand-jury (Rec., 2419); Plaintiff's Rebuttal Exhibit 8), but at the trial before the police judge Rice's attorney, at the instigation of Mrs. Diva Brown, Mayfield's ex-wife, who was present and supplying the attorney with the material for his cross-examination (Rec., 1987), made such a strenuous effort to force Mayfield to reveal every detail of his formula in all its minutiae, and was allowed so much latitude in this respect by the magistrate, that Mayfield evidently decided not to go before the grand-jury, and not to appear in the case again as a witness, for fear they might repeat the inquiry into his formula, and force him to divulge not only the "Celery-Cola" formula, but even his "Koke" formula. So the proceeding was dropped.

Plaintiff insists that Mayfield is impeached as a witness because, when he was asked in New Orleans on March 10th, 1915, concerning this Rice case, "You were not at the hearing?" he replied, "No, sir"; and then, later, when recalled to the stand in Chattanooga on July 5th, 1915, he said that if the record showed he had said, "No, sir," in reply to that question it must have been a typographical error, because he was present at the trial before the magistrate and would certainly have answered "Yes, sir," to a question of that kind, and believed that

he had in fact so answered. If the stenographer correctly transcribed his notes, it is probable that what Mayfield had in mind when he answered, "No, sir," was the *hearing before the grand jury*. The question asked of him was, "You were not present at the hearing?" The previous question was, "But he was *prosecuted?*" *to* which he replied, "I do not know, only about the *case*." Then followed the question, "You were not present at the *hearing?*" A.—"No, sir." He knew that he had not been present at the hearing before the grand-jury to prosecute the case in the criminal court, and that he had only attended the preliminary investigation before the magistrate, and when he was asked if Rice was "prosecuted," and, immediately after, if he was present at the "hearing," he evidently misunderstood the question and thought he was being asked about the proceedings in the higher court.

It is somewhat surprising to find counsel asserting that, if Mayfield had answered, "Yes, sir," they would have proceeded to question him further about his testimony in that case, and confronted him with the transcript of his testimony, in view of the fact that plaintiff only succeeded in getting the "Rice Record" admitted in evidence, over the objection of defendants, upon the representation of counsel that they did not have that record at the time they first cross-examined Mayfield in New Orleans on March 10th, 1915, and did not then know of its existence. (Rec., 1942, 1880).

HAROLD HIRSCH, Esq., General Counsel for the Coca-Cola Co., (Rec., 1942):

> "I wish to state that the transcript of the record in the case of the *State v. Melville Rice* was received by me on or about the middle of May, 1915, from

Birmingham, Alabama, and that it was only a short time before that that I had any knowledge of the existence of this transcript of this record, and that I had no knowledge of it at the time Mr. Mayfield was on the stand in New Orleans."

The main thing harped on in the "Rice Record" is the "Dear Judge" letter. Mr. Mayfield's explanation of this document is satisfactory and complete, and is borne out by the record in every detail. It completely refutes the inference sought to be drawn from it.

J. C. MAYFIELD (Rec., 2419):

"This 'Dear Judge' was the husband of my first wife. I will state, however, that she secured a divorce from me in Atlanta legally. The court gave me the children, and I did the best I could to raise them and educate them and bring them up. My wife was demented * * * but at times she had rational intervals, and at those times she was very grasping,—making money, and from the fact that I bought out the 'Coca-Cola' business while she was my wife, she thought she was entitled to a copy of the 'Coca-Cola' formula, notwithstanding the fact that she made with her attorney a final settlement that was satisfactory. This letter was written several years after our divorce. She demanded of me a copy of that formula. I put her off with one excuse after another. At this time my son and I had a little business in Jersey City. She went to his place of business,—I had no objection,—because my son was her son. I was over there once or twice, and she realized the value of the 'Coca-Cola' formula,—or the 'Koke' formula, which was the same, and thought if she could get a certificate from me she would be able to make considerable money by selling this formula. I put her off with one excuse after another, to the effect that I had misplaced the formula,—lost it here, yonder, or some place else,

—and that I would get it. I wrote her and wrote Brown several letters along that line, but she was so very anxious to get it that she came to Boston. *** When I wrote the letter in question she was there. I gave it to her. She came there for it. As I said before, she was demented. I wrote that letter, and I wanted to make it ring with a genuine ring, so that she and Judge Brown, who was her lawyer—he was her husband, but he was a lawyer, of course, he was a judge,—and she went back satisfied with that letter. I had put her off, as before stated, with other excuses. I promised in that letter to be in Jersey City or New York on Monday. I was not there, and did not go. If I had gone and given her a copy of my formula, and taught her and Judge Brown how to make 'Koke',—'Coca-Cola',—this letter and Mrs. Brown would never have appeared in the Rice case; but I did not go because it was practically my all. I came on back home. I realized what I was up against,—a woman who was demented and determined to have a copy of this formula,—and, being the mother of my children, naturally I thought and planned every way possible to get around giving her what she wanted without wounding her feelings. About the same time I received a letter from my father that one of my children was sick, so I left Boston. I did not go to New York, or to Jersey City, nor did I comply with my instructions in that letter. I came on to Atlanta, and then to Birmingham. Because I did not do what I promised to do, she appeared in this Rice case for no other reason in the world except to get all she could from me relative to this formula. She had no interest in the case, and she was there, and it was her questions, largely, that I answered. Of course, she propounded them through the attorney. The attorney did not know anything about all those oils, and all those things,—she, in a measure, did,—that is what she was after. She had possibly a superficial knowledge of the formula, and she wanted facts,—the proportional parts, and, by being there, she hoped to get

them. I evaded, in a way, a great many of her questions,—those which did not apply to the case at issue, knowing that she was not at herself. I had the city physician of Birmingham, Alabama, to be present at that time, and he was there. I told him what I had to contend with, and he said he would be present, and he noticed her condition. As before stated, the case at issue had no bearing on a great many of these questions, and as she had demanded a copy of the 'Coca-Cola' formula, or the 'Koke' formula, and I had told her and Judge Brown that I had lost it, or misplaced it, and she was there to get all the information she could. Of course, I had not lost it, and I had not misplaced it, because I was making 'Koke' in Jersey City at that time from the original 'Coca-Cola' formula,—I do not mean I was making 'Koke' in Jersey City at the time of the Rice trial, I am talking about Jersey City when I wrote this letter, and she was in Boston demanding of me a copy of that formula and the certificate from me that it was the original 'Coca-Cola' formula. I would not give it, but evaded her and put her off with the excuse that I had lost it, in order to get rid of the woman that was not at herself. I was trying to protect my property." (Rec., 2419-22).

S. T. MAYFIELD (Rec., 1458-1470):

"My father stayed in Atlanta until about 1898, just about 1897 or 1898, when he left there he went to New York. *** I stayed in New York for about a year, or a year and a half. When my father went to New York he manufactured 'Koke'. He manufactured it in Jersey City (Rec., 1458). *** I do not know just how long father was in New York. I cannot remember the exact time. I was with him about a year and a half. He manufactured 'Koke' over in Jersey City, on Warren St., as I remember it. * * * With my father there in Jersey City, be-

side myself, was my mother and her husband, Judge Brown. She married Judge Brown at that time. Judge Brown lived in Jersey City." (Rec., 1470).

J. C. MAYFIELD (Rec., 1593-4):

"The Wine of Coca Co. people decided that they wanted to open an office in Boston [in 1898], and they wanted me to go to Boston to establish same there. * * * I did go, and I thought I would just move my 'Koke' business to New York. * * * My son went ahead of me and picked out a little place in Jersey City. I would go over there often from Boston and manufacture goods for him. I did not manufacture every time, it was in the winter, but I would go over there and see how he was getting along."

Of course, Mrs. Diva Brown knew that he was making "Koke" in Jersey City, and of course she knew he was making it by the original "Coca-Cola" formula, which she knew he had obtained from old Dr. Pemberton in 1888.

J. C. MAYFIELD (Rec., 1682-3):

"After Mrs. Diva Brown left me, I have heard she went around the country claiming to have the original 'Coca-Cola' formula, and selling it. * * * She was making her own living, and that was the way she had of doing it."

JOHN D. FLETCHER (Rec., 1092-1094-5):

"I bought my drink from a man named Murphy, J. C. Murphy. He first called it 'Murphy's Cola'. (Rec., 1092). * * * The formula of Murphy's Cola' was made by J. S. Pemberton, I suppose. That probably would be absolutely true, but I do not know. The formula I used subsequently, after-

ward, was sworn to by Mrs. Diva Brown as having been the original J. S. Pemberton formula. Mrs. Brown, I understand she is dead, she afterwards married a man in Birmingham. I never met her in my life. I understood that she was married to J. C. Mayfield; she is supposed to be the same woman. I got my information from an affidavit, that the formula I bought from Mr. Romine, of Pulaski, in the year 1905, I believe it was 1905, he bought the formula from Mrs. Brown, who swore in that transaction to the affidavit she presented in the litigation I had with the Coca-Cola Co. as having been the original 'Coca-Cola' formula as put up by Mr. Pemberton in the preparation of 'Coca-Cola'. (Affidavit of Mrs. Brown): 'United States of America, State of Louisiana, Parish of Orleans, City of New Orleans: Personally came and appeared before me, the undersigned authority, Mrs. D. Brown, who, after being duly sworn, deposes and says: That this is the original "Coca-Cola" formula, owned and used *by her* before it was sold to the present Coca-Cola Company, of Atlanta, Georgia."

E. J. Smyly says (Rec., 1393) that Mrs. Diva Brown, who claimed to have been an ex-wife of J. C. Mayfield, sold him an alleged "Coca-Cola" formula in 1907. In a little pamphlet gotten out by her, part of which was read into the record by plaintiff (Rec., 1096-8), Mrs. Diva Brown made the statement that she was one of the members of the Pemberton Medicine Co., to which Dr. Pemberton transferred all his formulas and business, including the "Coca-Cola" formula and business, —in association with Dr. Pemberton, Murphy, Bloodworth and Mayfield. It is plain, now, why she got E. H. Bloodworth to make the affidavit he is alleged to have made on July 18th, 1905 (Rec., 1681) to the effect that:

"In 1888 *O. A. Murphy*, of Barnesville, Ga., and *J. C. Mayfield*, of Alabama, and *myself*, bought Dr. Pemberton's formulas, including 'Coca-Cola'. Mrs. D. Brown was then the wife of J. C. Mayfield. *She was not known to us as a member of the Pemberton Medicine Co.*, but she spent considerable time in our laboratory, and took a great deal of interest in our business."

This evidently did not satisfy Mrs. Brown, so she got Bloodworth to make another affidavit on August 9th, 1905, reading this way (Rec., 1265-6):

"In 1888 A. O. Murphy, of Barnesville, Ga., *Mrs. Diva Brown*, and myself bought Dr. Pemberton's formulas, including Coca-Cola. Mrs. Diva Brown spent considerable time in our laboratory and took quite an interest in the business."

J. C. MAYFIELD (Rec., 1682) in referring to this affidavit, said:

"I have seen the whole thing. It is not true. This is true, that A. O. Murphy, of Barnesville, and J. C. Mayfield, of Alabama, were connected, but my wife had no connection whatever."

And again (Rec., 1679-80):

"XQ.—And Mrs. Diva Brown was around the plant in Atlanta, Ga., she was Mrs. Mayfield at that time, and was around the plant in Atlanta, Ga., was she not, when you first started to manufacture? A.—No, sir, she was not there in 1888. * * * She was not around the place. Nobody ever saw her around there during the first business there, 1888 or 1889."

A. O. MURPHY (Rec., 1290):

"She had no interest in the business at that time, or during the time I was associated with it, whatever, nothing to do with it."

MELVILLE RICE (Rec., 1986-1987):

"I was the defendant in the case of *The State v. Melville Rice* that was tried in Birmingham, Ala. * * * Yes, I remember the introduction of a letter in that case signed 'Jack' to 'Dear Judge.' * * * I think the letter was introduced by Mrs. Brown, who took possession of it after it had been read in court. * * * This Mrs. Brown was Mayfield's former wife, Mrs. Diva Brown. * * * She was present in the court room at the time of that trial, and I believe she did supply Judge Allen with the dope for his cross-examination."

B. M. ALLEN (Rec., 1905-6):

"I am an attorney-at-law and live in Birmingham. *** Yes, sir, I remember a case in 1907 tried before Judge Bonner,—at that time it was called the Inferior Court,—entitled *The State v. Melville Rice.* I was attorney for the defendant in that case. * * * I remember what the man was charged with, I think, and what the general line of inquiry was,—he was charged with stealing some syrup, I believe, something of that sort, also some supposedly wonderfully valuable formulas,—I know *I tried to find out what they were.* * * * There was also a lady, who had formerly been *Mrs. Mayfield,* who was *interested in the case.*"

J. C. MAYFIELD (Rec., 2436-7):

"She was after all the information she could get about the 'Koke' formula, or the 'Coca-Cola' form-

ula. I had evaded giving it to her in every way possible. She stated in some of her advertisements and things that she had the original 'Coca-Cola' formula. * * * If I had given her the copy of the formula * * * she would not have appeared in this case, but not having it, and not being able to sell the formula as she wanted to, she appeared in this case and sought all the information possible, and that is why those questions were asked. I evaded them along that line, because they were immaterial and did not have any bearing on the case at issue. * * * At the time of this trial, April 19th, 1907, she had not a satisfactory formula. She did, however, after that, in some manner get a satisfactory formula, or, rather, a formula,—I do not know that it is a satisfactory formula,—but a formula that made a good cola beverage. I know she got a lot of it in this particular trial, and, as Rice had stolen my 'Celery-Cola' formula, I have reasons to believe that Rice gave her a copy of the 'Celery-Cola' formula.

Plaintiff then arranges a "deadly parallel," in which however, there is nothing of any importance in the way of a contradiction. It is true that Mayfield said that Mrs. Diva Brown, his former wife, may have helped him a little, together with his son and Mr. Bloodworth along in '93 up to '94 or '95, and, when asked if she was familiar with the formula that he got from Dr. Pemberton, replied, "Well, I could not answer that,—she had opportunities, helping around there, to get familiar with it, and what a wife would have with a husband's business;" and it is true that Steve T. Mayfield used the expression, "My mother and John McCowan made 'Koke' at that time." But Mr. J. C. Mayfield goes on to explain (Rec., 2427-2428):

"I will state this in the way of explanation. There are two formulas; one is a scientific formula, making the extracts, the flavoring, the compound; and the other is a mixing formula, a manufacturing formula. * * * The scientific formula is compounding the essential oils and making the fluid extracts, as we use now,—tea,—prior to the Pure Food Law it was the fluid extract of coca leaves,—and making of the other things we needed in an extract form from the crude drugs. When we had the other people to do the manufacturing we would number these things. No. 5 would mean a certain thing; No. 4 would mean caffeine, or sugar, or flavoring, or extract of some particular thing. That was a mixing formula, manufacturing formula, and the other was a chemical formula, a chemist's. Q.—Did anybody else besides you know the mixing formula? Oh, yes, my sons knew the mixing formula, but they did not know the scientific end of it. Mr. Britton knew the mixing formula."

In other words, Mr. Mayfield was conducting his business then on the same plan as the Koke Company of America now conducts its business. Mr. Mayfield always made the flavoring compound himself, personally, just as the Koke Company of America does today, but he showed numbers of people how to convert this flavoring extract into a syrup by mixing with it sugar, water, glycerine, etc., in the prescribed proportions, just as the Koke Company of America now shows its various territorial licensees, and some of its bottlers, how to manufacture "Koke" syrup from the concentrated "Koke" compound which it manufactures.

For example, plaintiff's witness, John H. Bohne, who says he formerly *"manufactured"* "Celery-Cola" in St. Louis for the J. C. Mayfield Mfg. Co., there in 1903, says (Rec., 2043-4):

"I held the position of chemist when with Mayfield, and *manufactured* all the syrup. * * * As a chemist, I did all of the *compounding* for Mayfield. * * * I do not know just where the *flavor* came from that he used in his 'Celery-Cola', *that was the only part that I did not manufacture*,—but I added that according to his instructions. What the formula called for, I did not analyze that. We had it sent up here in five and ten-gallon kegs, and we added that to the 'Celery-Cola', the *flavor*. * * * Mr. Mayfield turned the formulas over to me, *with the exception of the formula for the flavor.*"

TOM ANDERSON, plaintiff's witness (Rec., 1914-1915):

"I worked for Mr. Mayfield individually something like three or four weeks, and then I worked for the Celery-Cola Bottling Co. between two and three years. For the last named concern I mixed their drinks and bottled them, both. * * * I made the syrup myself that was used by the Celery-Cola Bottling Co. The *extracts* were *made by someone else*, and I had to mix the *extracts* with the *syrups* to make up the drinks they wanted."

JOHN T. ENSLEY (plaintiff's witness), who states (Rec., 1901) that he was connected with the Mayfield Mfg. Co. in Birmingham from about 1901 to about 1906, says (Rec., 1904):

"They had their *extract* business away from here part of the time, and manufactured, I believe, in St. Louis and Nashville. * * * They shipped *extracts* from those cities to Birmingham. They had a branch house in St. Louis, I believe, and probably in Nashville. As a matter of fact, *Mr. J. C. Mayfield, Sr.*, made up his *extracts* most any place he was at,—get him a paddle and barrel and mixed up his extracts. He would go about the country and wherever he happened to be he would make up a

batch of it, and, as I say, in St. Louis, Birmingham, and Nashville he made extracts."

W. J. CHEEVEIS (plaintiff's witness), in describing the part which the Southern Koke Co., Ltd., took in "making" "Koke", said (Rec., 595-601):

> "That was before they began to *make* the drink in New Orleans. Then they began to *make* it here. * * * The product I first knew of, from the time of the organization of the company, the syrup was shipped from St. Louis and was *mixed* on Howard Ave. after the tanks were put up. I never saw the syrup made, that was made in St. Louis, as I understand it, but it was brought here in barrels * * * and *sugar* added to it. (Rec., 595). * * * The syrup came in and *they mixed it with sugar*, added the *extract* that they had received from St. Louis, and added the *glycerine*, and then went ahead." (Rec., 601).

J. C. MAYFIELD (Rec., 1668):

> "What I considered the key-note of the whole thing was the *flavor*, and the boys always had a gallon or two of *extract*, and it was an easy matter to do the *mixing* of the other things."

That is evidently just what he did in Atlanta, also, when Steve Mayfield says, "My mother and John McCowan *made* Koke." They didn't compound the concentrated flavoring extract, they merely mixed that with syrup, just as Bohne did in the case of "Celery-Cola", and as Tom Anderson did. Of course, being around the plant, Mrs. Diva Brown had an opportunity to see the various packages of drugs and essential oils that were delivered there for Mayfield to use in making up the concentrated compound, and, therefore, to acquire some

information as to what the various ingredients were; and, of course, she knew the "mixing formula,"—she knew how much syrup to mix with the flavoring compound, and, in fact, what proportions of sugar, water and glycerine to use in making up the syrup. As Mayfield says, "she had possibly a superficial knowledge of the formula," but "she wanted facts,—the proportional parts," (Rec., 2422) and that is what she didn't know but was trying her best to find out.

Plaintiff argues that Mayfield's statement to the effect that Mrs. Diva Brown didn't know the "Koke" formula cannot be true because "S. T. Mayfield swears she did," and, hence, that the explanation of the "Dear Judge" letter is unpersuasive. But the vice in this argument is that S. T. Mayfield didn't say that his mother "*knew the formula*,"—what he said was that she and John McCowan "*made* Koke," which meant, of course, that they mixed up the syrup from the concentrated compound, which anybody could do. Even the negro, Tom Anderson, was capable of doing that Rec., 1915).

But it is said that Mrs. Diva Brown sold a formula to Al Campbell in 1907, which S. T. Mayfield says "was practically the same thing" as the "Koke" formula, and it is argued from this that Mrs. Brown must have known the "Koke" formula all along in order to be able to sell a formula so nearly like it to Al. Campbell. But this argument overlooks the fact that Mrs. Brown did not sell her formula until the latter part of 1907, that the Rice trial took place some time before that, and that Mrs. Brown got a great deal of information from Mayfield's cross-examination in the Rice trial, which undoubtedly enabled her, with the information she already had, to piece together a pretty fair cola drink formula.

If it was a cola drink formula at all, it was bound to be "practically the same thing" as the "Koke" formula, because they are all more or less alike, just as all the root beer and sarsaparilla formulas are practically the same. Besides, the formula by which Houppert and Smyly had been theretofore making their "Dope" syrup was practically the same as the Diva Brown formula, except that the latter required the syrup to be boiled, whereas, the former merely prescribed that it be mixed with cold water in a barrel.

E. J. SMYLY (Rec., 1393-4):

> "No particular change in the formula was made, only we changed the way of making it. We used to, at one time, make it out of green syrup, but afterward got to cooking it in a kettle and mixing it in a tank. Mr. Houppert bought a formula from Mrs. Diva Brown. That formula was not very much different from ours. She specified in her formula that we had to cook the syrup, boil it, mix it in a mixing tank, where we had been making it in a barrel. * * * The product we made prior to the time of buying this Diva Brown formula, so far as taste is concerned, tasted about the same, a caffeine drink. The color was the same."

No doubt Mrs. Diva Brown knew how to properly prepare the *syrup*. She had done so for Mayfield years before. But that is a very different thing from knowing the *formula* for making the *concentrated flavoring compound*.

Then plaintiff quotes from the "Rice Record" as follows:

> "Q.—Don't you advertise that you know how to make, and do make, 'Coca-Cola'? A.—I do not

make it. I advertise the letter that Dr. Pemberton's wife gave me, that I once was associated with her husband in the manufacture of 'Coca-Cola'. Q.—And you knew how to make it before the present Coca-Cola people got the formula? A.—I think she stated that to me." (Rec., 2438).

J. C. MAYFIELD (Rec., 2438):

"The facts are that I did manufacture 'Coca-Cola' before the present 'Coca-Cola' people bought Dr. Pemberton's interest, and I had the 'Coca-Cola' formula. Mrs. Pemberton gave me that certificate, —certified it before a notary public,—because it was the facts in the case. You call my attention to the fact that in the answer above quoted I used the present tense: 'I *don't* make it, that is, that I don't make *'Coca-Cola';* I meant there that I did not make and label my goods 'Coca-Cola', but I did make the same goods and label it 'Koke'. I did not say it there, but that is the facts in the case. The same goods from the same formula."

Why, if any one were to ask Mayfield today if he were making "Coca-Cola", he would tell them, "No," that he is making "Koke", but that it is made according to the *original* formula for "Coca-Cola" that Dr. Pemberton originated (except for the modification made necessary by the Food & Drugs Act). If he had been representing to the public that he was making "Coca-Cola", plaintiff would probably have sued him long ago for unfair competition for attempting to sell his goods as its goods.

Then plaintiff parades the following excerpt from the "Rice Record":

"You claim that the Coca-Cola people got Pem-

> berton's formula and that you were entitled to it? A.—No, sir, they bought it from Pemberton. Q.—You have been claiming all the time that you had the 'Coca-Cola' formula? A.—Not the 'Coca-Cola' formula." (Rec., 2436).

Now, these questions were being propounded to Mayfield from the suggestions supplied by Mrs. Diva Brown, and it is evident that she knew Mayfield had made these claims all along, and that she told Judge Allen so, and got him to ask the questions so as to open the door for an examination into the "Koke" formula. Rice was charged with *grand*-larceny, and the warrant stated that the value of the "Celery-Cola" formula was somewhere in the neighborhood of several thousand dollars,—at any rate it was of sufficient value to make its theft *grand*-larceny as distinguished from *petty*-larceny. It was stated that the "Celery-Cola" formula was a *secret* formula, hence its enhanced value as a trade secret. Allen adopted in his cross-examination the shrewd theory that, if the formula were not a secret, and if there were other formulas in existence just like it, or similar thereto, then its enhanced value as a secret formula would be exploded, and the grade of the offense would be reduced from grand-larceny to petty-larceny, with only a nominal punishment. It was upon this theory that the magistrate gave him great latitude in prying into all the details of the "Celery-Cola" formula, and in permitting him to ask all kinds of questions about other similar formulas. Of course, if Mayfield had admitted that he also had the "Koke" formula at that very time, and that it was similar in many respects to the "Celery-Cola" formula, Allen would have immediately launched into a minute cross-examination as to all the details of that formula, under the guise of attempting to show that it was

identically the same as the "Celery-Cola" formula, and Mrs. Brown's object would have been accomplished. Mayfield was just sharp enough to sense all this, and so, as he says, in referring to the answers he made to these questions (Rec., 2437):

> "I evaded them al- ng that line because they were immaterial and did not have any bearing on the case at issue. As before stated, my property was at stake, and that is why I answered those questions along there as I did."

Under the heading "Manufacture of Koke in Birmingham and Nashville," plaintiff has gotten up another "deadly parallel." In one column plaintiff quotes statements of Mayfield to the effect that the J. C. Mayfield Mfg. Co. bottled all his soda water flavors, including "Koke", in Birmingham, and that in Nashville the same company "manufactured" "Koke". In the other column is an excerpt from Mayfield's testimony in the "Rice Record" in which he made the statement that the J. C. Mayfield Mfg. Co. was doing nothing then but supplying the Celery-Cola Co. with the two specialties, "Celery-Cola" and "Pepsi-Nola", that it was not manufacturing anything at the time but "Celery-Cola", and that the Celery-Cola Co. was not manufacturing anything at the time except th- wo specialties referred to, although it did other business. In the "Rice Record" Mayfield was speaking specifically of the *corporation* known as the J. C. Mayfield Mfg. Co., which was incorporated at Nashville, Tenn., and to which the "Celery-Cola" business, for- la, and trade-mark had been duly and formally assigned in writing. He had never assigned the "Koke" business to that concern, but had always owned and conducted that business individually, up to the time of the organization of the Koke

Company of America. It was so alleged in the answer. (Rec., 40), and has been so stated by Mayfield all through his deposition. For instance,—

J. C. MAYFIELD (Rec., 1616):

"After I bought out Mr. E. H. Bloodworth, *I* continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Company of America."

And again (Rec., 2423):

"There appears in the 'Rice Record' the following questions and answers: 'Q.—Mr. Mayfield, what business is the J. C. Mayfield Co. engaged in? A.—They have contracts with the Celery-Cola Co. on their specialties. Q.—What specialties? A.—Celery Cola and Pepsi-Nola. Those were the only two things the J. C. Mayfield Mfg. Co. had just at that time. I individually owned the 'Koke' formula. It was not owned by the J. C. Mayfield Mfg. Co., but by me as an individual."

And again (Rec., 2430-1):

"On pages 24 and 25 of that record appears these questions and these answers. 'Q.—Mr. Mayfield, what does your company manufacture besides this 'Celery-Cola?' A.—That is all they do. Q.—Does this Celery Cola Co. manufacture anything except Celery Cola? A.—They do other business, but do not manufacture anything else except these two drinks.' The facts are that those two specialties is what they manufactured. The Celery-Cola Co. had a license from the Mayfield Mfg. Co. to manufacture those two specialties. * * * They bought other extracts and manufactured other syrups, and they bought other things and sold them on the market. * * * When I say the Celery-Cola Co. *manufactured* the 'Celery-Cola', I mean they *mixed the syrup.*"

Mayfield was president and principal owner of both the Mayfield Mfg. Co. and the Celery-Cola Co., and he manufactured his "Koke" in the same building which those companies occupied, and carried on his "Koke" business under the trade-name of whichever company's building he happened to be in at the time, and, naturally, in speaking loosely of the matter, he stated that one or the other of those companies manufactured or bottled his "Koke". But of course, in strictness, they did not do so, because they did not own the product or the business. Mayfield just took advantage of their facilities to manufacture and market "Koke".

For example (Rec., 1664-5):

> "After I bought in with Mr. Schuyler in the vinegar business I bought out Ensley & Moody [who had been running the Celery-Cola Bottling Co. prior thereto in Birmingham] * * * I took over the vinegar business and took over the bottling business, and united them, under the name of J. C. Mayfield Mfg. Co."

Here it is apparent that he was conducting the vinegar business and the bottling business as an individual under the trade-name of J. C. Mayfield Mfg. Co., and that it was not the Nashville corporation to which he referred at all.

Then plaintiff tries to make out a contradiction by urging that, after Mayfield had stated that the various companies made the various products, he turned around and stated that *he* made all of them personally. Of course, the companies were mere legal entities and could not actually manufacture anything themselves. They had to act through some person as agent, and what May-

field here stated was that he was that agent who actually did the manufacturing.

J. C. MAYFIELD (Rec., 2431):

> "I am asked to state whether at that time the Celery Coca Co. made the Koke, or whether the J. C. Mayfield Mfg. Co. made it, *** or who did make it. *** I manufactured all the stuff, not only 'Celery-Cola', and 'Pepsi-Nola', *and* [but] manufactured 'Koke'."

Plaintiff has quoted from Mayfield's testimony (Rec., 1595) as follows:

> "I went to St. Louis to see if I could not organize a company there. It was a bottling company. *** Maybe I stayed there until 1900, sometime in 1900. Then I went from there to Nashville. I was all the time making 'Celery-Cola' and 'Koke'."

But where plaintiff placed the asterisks it omitted the statement reading as follows: "and made arrangements to get the goods on the market, *but we did not succeed.*"

Evidently plaintiff was here building up a straw case to be demolished later. It referred to the testimony of Norville N. Leaver (Rec., 2035) and John H. Bohne (Rec., 2041) who were connected with the Celery-Cola Co. of St. Louis, in 1903 and 1904, which concern was operated by Jerome and Mrs. Brooks (Rec., 2446) and which no one pretends ever had any license to deal in "Koke", or ever in fact mixed any "Koke" syrup, or handled it in any way), and then triumphantly asserted that, because these two parties never heard of "Koke" during their connection with that concern, therefore Mayfield is "successfully impeached." Plaintiff also "impeaches" Mayfield by the witness M. J. Handley

(Rec., 1989), of Nashville, by stating that he was president of the Tennessee Carbonating & Supply Co., that this concern had a contract with the J. C. Mayfield Mfg. Co. in Nashville to supply it with two of its products,—"Celery-Cola" and "Pepsi-Nola",—and that he never heard of the J. C. Mayfield Mfg. Co. ever selling any product under the name of "Koke". Handley says (Rec., 1990):

> "I don't know whether or not the J. C. Mayfield Mfg. Co. was, as a matter of fact, manufacturing a number of different specialties, I couldn't say. We handled 'Celery-Cola', 'Pepsin-Ola', and very little 'Vig-O'. Of course, I don't pretend to say positively that the J. C. Mayfield Mfg. Co. was not manufacturing and selling a product by the name 'Koke',; I don't know what they were manufacturing. * * * So far as I knew they may have been manufacturing a product called 'Koke'. * * * Now I want to say another thing,—when we first began the business it was on Market St., and J. C. Mayfield had a laboratory in the rear of the building over there. Now, I noticed him ship the stuff out of there, but I never knew what it was,—put up in barrels and shipped it away, and I never knew what it was. I couldn't say whether it was 'Koke' or not."

Plaintiff then called several witnesses in an effort to show that "Koke" was not manufactured in Birmingham. The main witness was W. M. Smith (Rec., 1893), and he set the pace for all the others. He said (Rec., 1899):

> "I don't consider it dishonorable, or a sign of a lack of integrity, to deliberately falsify."

Evidently he believed in putting his convictions into practice (Rec., 1897):

> "Yes, sir, I deliberately told you a falsehood when you asked me the question, and I confess publicly before the court that I falsified on that occasion."

This is the witness who produced "the little slip with 'Koke' printed on it," and who testified that Mayfield handed him this slip at the time of speaking to him with reference to being a witness in behalf of defendants in this case. He said on direct examination (Rec., 1894-5):

> "Yes, sir, on March 4th., or 5th., of this year, Mr. J. C. Mayfield, Sr., stopped me on 3rd. Avenue and 20th. St., Birmingham, and asked me to wait a minute. He called me off to one side and said, 'We are having court up here at the Tutweiler Hotel. I want you to come up here. Maybe you can do me some good. We are bottling a drink called 'Koke', and I know you have seen the stuff that we bottle. All you have to do is to go up there and tell them we have been bottling that stuff.' He handed me a little slip with 'Koke' printed on it. After that he asked me what I was doing then, and I told him I was in the automobile business, but was not working just then. 'Well,' he said, 'maybe after this case is over, perhaps I could give you a job in Louisiana in the bottling plant down there.' He took down my address and gave me that little slip. This little slip marked Plaintiff's Rebuttal Exhibit 66 is a slip just like the one that Mr. Mayfield handed me, but I didn't notice about the number of it. I told Mr. Mayfield I didn't know whether I could go down there or not, but if I could do him any good I would like to if there was any possible chance; I didn't know whether I could or not."

On cross-examination he said (Rec., 1896-7):

> "XQ.—Now, I will ask you, Mr. Witness, if Mr. Mayfield didn't ask you if you remembered his naming 'Koke' in Birmingham in 1904, 1905, and 1906, and if you didn't make the statement, in the presence of Mr. J. C. Mayfield and W. F. Norman, that you did remember that he made 'Koke', and if you didn't go on and describe the label with which the product was labeled? A.—Mr. Mayfield asked me to say that. XQ.—On the contrary, didn't he ask you whether or not he had made 'Koke' A.—He asked me, yes, sir. XQ.—If you remembered his making 'Koke'? A.—He asked me did I remember it and I told him yes. XQ.—And you told him yes? A.—Yes. XQ.—And I now ask you whether or not you didn't come into this hotel then, the Tutweiler Hotel, in the presence of J. C. Mayfield and W. F. Norman and me, A. B. Littleton, and make the statement to me that you remembered his making 'Koke', and labeling it 'Koke', and that you wa ed his 'Koke' bottles, and that your recollection on .iat was clear, and if you didn't describe the 'Koke' label to me? A.—Yes, sir. XQ.—That statement you now say is untrue? A.—I didn't say it was untrue, I tell you I did say that. XQ.—You told me that was true, that you remembered that at that time? A.—Yes, sir. XQ.—Well, was it a fact, did you remember it, or did you not remember it? A.—I did remember it."

This witness' versatility in lying is truly amazing. On his direct examination he said (Rec., 1894), "I told him [Mayfield] I was in the automobile business, but *was not working just then.*" On cross-examination he said (Rec., 1896): "No, sir, I was not satisfied *with the position I had.* I wanted to *change* and go to New Orleans *because I had kin people down there.*" On redirect examination he said (Rec., 1898): "You say that

if I have any statement to make as to why I made the statement, which I now say is false, to Mr. Littleton and the gentlemen he has named, I can go ahead and state it; well, I simply made the statement because *I was out of a position*, and I thought maybe there was a chance for me getting a position,—*I had tried to get a position in town and there wasn't a possible chance.*" On re-cross-examination he said (Rec., 1898-9-1900): "You ask if I would sell my honor and my integrity for a mess of pottage; I don't know exactly whether I would or not. You ask if I didn't state to you on cross-examination that I had a job here at the time, and that I was well satisfied with it; *I had a job*, but the job *wasn't paying me enough money*. You ask if I didn't just this minute tell Mr. Hirsch that *I was out of a job and looking for one;* yes, *I was out of a job.* * * * You ask if I didn't just make the statement to you that *the job I had was entirely satisfactory*, and that *I had no reason for making a change* except the fact of *my kin people living in New Orleans;* you ask if I didn't just make that statement; *sure I did.* *** You ask if I now make the statement that the inducement which impelled me to sacrifice my honor and integrity and to come up here and deliberately falsify, was to get down to New Orleans to my kin people,—if that's the price I was willing to pay for selling my honor and integrity; no, not exactly. I wasn't undertaking to sell my honor. *** You ask me which, then, is the truth, the fact that I had a job or didn't have one; *I had a job* with the *Jitney Motor Car Co.* You ask which is the truth, that I was satisfied, or not satisfied, with the job; I wasn't satisfied with the money I was getting at my trade of automobile mechanic. The job was satisfactory, all except I wasn't getting enough salary. You ask which one of the statemer is true, that I wanted to go to New Orleans *to be with my kin people*, or that

I wanted to go there *on account of getting a better job;* I wanted to *get a better job.* You ask if I repeat the statement that I wanted to go to my kin people; I haven't seen them since I was a baby, and don't know anything about them. All I know is they are down there, and that's all. Yes, sir, I would like to go down there to see these people, who are utter strangers to me and who I have never seen in my life, and *that's* the impelling inducement that made me want to leave a fine city like Birmingham and go down to a place like New Orleans." (See J. C. Mayfield, Rec., 2450).

Will Barrow is another versatile witness. He said (Rec., 1925-6):

"I started work for the *J. C. Mayfield Mfg. Co.* in 1906 or 1907, and worked there about a year and a half or two years. *** Yes, sir, I was working for the *Celery-Cola Bottling Co.* You say you thought I told Mr. Hirsch a moment ago that I was working for the J. C. Mayfield Mfg. Co.; he was running the Celery-Cola Company on Morris Ave., *so they said.* I was working on Morris Ave. for the *Celery-Cola Co.* Yes, sir, I now say I was working for the *Celery-Cola Co.* at 2116 Morris Ave., and *not* for *J. C. Mayfield.* You ask if I mean to say I don't know the name of the company I was working for; yes, sir, I know it. You ask which one I was working for; I was working for the *J. C. Mayfield Mfg. Co.* You say, then, that I was not working for the Celery-Cola Co.; he was bottling it at the time I worked for him. You again ask which one of these companies I was with; I worked for the *J. C. Mayfield Mfg. Co.* on Morris Ave. *** You again ask which company I was working for; I was working for the *Celery-Cola Co.,* I suppose. You say that just a

minute ago I said I was working for the *J. C. Mayfield Mfg. Co.; that's where I was working at.*"

There is no telling where this witness did work,—whether for the J. C. Mayfield Mfg. Co., or the Celery-Cola Co., or the Celery-Cola Bottling Co., or for J. C. Mayfield individually. He says he started as bottle washer,—at whichever plant it was,—and later got a job bottling (Rec., 1926). He says, "He was making a lot of drinks there." (Rec., 1927). He says that, besides the soda water, they handled "Hop-Ale", some bitters, and cider and vinegar. (1927). He admits he don't know the brands they put on the cider, or what was on the labels. "I can't remember about them at all," he says. (1927). He can't remember the different brands labeled on the vinegar. As to the soda waters, he says all he can remember are strawberry, lemon, orange phosphate, "Celery-Cola', and "Pepsin-Ola". (1928), and adds, "I won't say but there was others, but these is what I can remember. There may have been others. That's been a long time ago, and there may have been others that I can't now remember the names of,—yes, sir, that's right, there may have been others." (1928). He admits he can't read or write (1927). He admits that he didn't handle any of the barrel stuff that went out, and that he doesn't know what labels were put on the syrup barrels (Rec., 1930).

S. A. Ellis is another typical witness in this group. He says (Rec., 1843):

> "I was connected with J. C. Mayfield, Sr., in the soft drink business in 1902, I believe it was. *** He was manufacturing drinks of different kinds, I couldn't name all that he handled, I don't know. The concern was called the Celery-Cola Co. You ask

what was the name of the syrup he was manufacturing; well, I don't know that he said. He was manufacturing 'Celery-Cola' syrup, or Cola syrup, I think that was what they called it. *** 'Celery-Cola' was the principal thing that was being delivered from the wagons. He also had some other drinks,—soft drinks of different kinds,—different flavors, you know. I don't recall to mind now the names of any of the others besides 'Celery-Cola'."

This witness was in no position to testify that "Koke" was not manufactured and sold in Birmingham by some one of the various companies in which Mayfield was interested, during his connection with the Celery-Cola Co. And he is typical.

L. M. Barclift is another of the same stripe. He says he entered the employ of the J. C. Mayfield Mfg. Co. in 1902 (Rec., 1844), but that he had previously been employed by the O. L. Gregory Vinegar Co. and the Schuyler Vinegar Co., which Mayfield later bought out (1844) and that "I was a vinegar salesman primarily." *** I had a trade in vinegar and cider, and I was sent out on the road primarily to sell vinegar and cider, that was my business. If I handled any soft drinks at that time, my main idea was to sell vinegar and cider." (Rec., 1846). It is not apparent just why a vinegar salesman, who spent all his time on the road selling vinegar and cider, should be called to advise the court as to what different soda water brands and flavors were being manufactured and sold in Birmingham by J. C. Mayfield. That this man is an undesirable witness is plain. He says (Rec., 1848):

"Before I came and sat in this chair, I had not talked to any one on this subject,—on this question, —on this case, about what I have been testifying

here. No, sir, I have not repeated to anyone, either wholly or in substance, what I have said in this room, nor any part of it. *** Mr. Bodeker and I were walking up the street, and we talked about several different things,—about Mr. Patton, an officer who used to be here, a friend of mine, getting shot and died. Anything else I talked about had nothing to do with this present matter, except that Mr. Bodeker brought me up here and introduced me."

Then he turned around and admitted (Rec., 1850) that sixty days before that he had received a long distance telephone call in Chattanooga from George H. Bodeker asking him to come to Birmingham; that he went to Birmingham in response to the call; and that he went to Bodeker's office in the Brown-Marx Building, in Birmingham, and dictated to Bodeker's stenographer a full and complete statement "in regard to this business, —practically the same as you have been asking this morning." He first said that when "she took my first statement down, *I don't think there was anyone present* but the *stenographer,* but *Mr. Bodeker* came in *later.*" Then he turned around and admitted that "I believe *Mr. Bodeker asked me the questions in front of the young lady.* You say that I said I made a statement first, and Mr. Bodeker came in later, and you ask if that is what I mean to say; I mean to say that I was there,—*he was there when the young lady took it down,* and then she wrote it off, and I signed it after he left,—he asked me the questions and she took them down in short-hand, and wrote it down and handed it to me and I signed it. Mr. Bodeker had gone." (1850.) This statement which the witness says he dictated to Bodeker's stenographer is in evidence as Plaintiff's Rebuttal Exhibit 2 (Rec.,

1853). In regard to this statement, Barclift was asked: (Rec., 1854):

> "You ask, if there is any difference between my testimony and my signed statement, which you shall accept as true; bring me up again,—give me a new chance. Well, what I have testified to here is the truth, as far as I know. There might be a difference in the questions asked here and in the statement." (Rec., 1854).

DAVID EARLE MOODY (Rec., 1883-5):

> "The principal territory I traveled was within a radius of 100 miles of Birmingham. *** I was constantly on the road during that time. *** I made a specialty of the 'Hop-Ale', and sold more of that than anything. *** I had nothing to do with the manufacture of any of these specialties which either the Mayfield Mfg. Co. or the Celery-Cola Co. were getting out. I was merely a salesman, and had nothing to do with the laboratory end of it. I passed through the laboratory occasionally, but not often. I don't know of my own knowledge all the things that were made there, and I don't pretend to testify positively as to everything that was made there. I only know the things given me to sell, and if they made anything else there, any other product under any other name, if it didn't happen to be given to me to sell, why, of course, I didn't know about that."

B. U. HOPPER, when asked if Mr. Mayfield made any extract or syrup called "Koke", replied (Rec., 1892-3):

> "It has been so long ago that I don't remember it. Of course, he could have made it, and I couldn't say that he didn't make it. *** He was making a number of these extracts, but 'Celery-Cola' was the thing he was pushing. However, along with that

> he was making a lot of little extracts and syrups *** and there was quite a number of them. I couldn't say that I could name them all, at all."

J. T. ENSLEY (Rec., 1904):

> "Yes, sir, he was making a number of extracts, and I don't pretend to remember all the extracts he was making, I couldn't call all the names. *** It is possible he could have made it ['Koke'] without my knowing about it."

Thomas Dixon is a negro. He admits that "I don't know the number of different brands of cola drinks Mr. Mayfield was making and selling at the time. I can't remember whether he was selling two or three or not, because there were different soda waters, you know." (Rec., 1910).

He says he worked for the Mayfield Mfg. Co. about 1902 or 1903 (Rec., 1907), and that "I was the boss of the negroes, and would be after all the negroes who handled the vinegar. I certainly did see that they put the proper labels on it, but I can't remember the name of a single brand of vinegar he put out." (Rec., 1908).

GEORGE E. ANDERSON, (colored) says that he worked for the J. G. Mayfield Mfg. Co. from 1902 to 1905, and that during all that time Dixon "was not a superintendent of the colored people there at all." (1918). He says that during the whole of that period Dixon was the drayman (1918).

HOMER BREWER is a negro employe of the Coca-Cola Bottling Co. in Birmingham. He says (Rec., 1912):

"I haven't been talking to anybody about my testimony in this case. No, sir, I never breathed it to a living soul before I entered this room just now. Nobody on earth knew what I was going to testify to until I came into this room and took that chair. No, sir, Mr. Bodeker over there never did see me about it, nor did Mr. Pierce. Nobody at the Coca-Cola bottling plant ever talked to me about my testimony. Yes, sir, I was in the other room just now. You ask if Mr. Pierce was in there, too; I don't know Mr. Pierce. No, sir, I was not talking about my testimony in this case in the other room. I don't know, sir, how they knew what I knew about it. You ask if they just dreamed it; I don't know, sir, how they knew about it."

He says he worked for the Celery-Cola Co. at one time. "That's all I did around there, just washed bottles, and I don't know anything else that was going on there at all except the bottles I would wash." (Rec., 1913).

TOM ANDERSON, another negro, admits that he only worked for Mr. Mayfield for three or four weeks, when his pay was cut, and thereupon he got a job with the Celery-Cola Bottling Co., (Rec., 1914) which was then owned and operated by Ensley & Moody (Rec., 1917), and which nobody pretends ever bottled "Koke". He also says that Dixon was the drayman and not the negro boss (Rec., 1916).

MACK CRAWFORD, still another negro, was also a drayman. He says (Rec., 1921): "I didn't haul anything but 'Celery-Cola' as I know of. I didn't know no other name but 'Celery-Cola', that's the only name I know of." (Rec., 1921).

WALTER THOMAS, still another negro, was another one of the draymen. He says (Rec., 1922):

"That's all I ever hauled, 'Pepsin-Ola' and 'Celery-Cola'. I never hauled any of the other products that they made, that's all I know of."

W. J. GARRETT, (Rec., 1985):

"Oh, yes, it is quite possible that he might have made a product 'Koke' and sold it as such. They made a good many different things back there, and he was always a great man to be experimenting all along."

Finally C. J. Pogue is brought forth in the disguise of an ardent adherent of defendants, forced to take the stand against his will, and confessing with the greatest reluctance the awful wickedness of defendants.

But plaintiff's chief detective, H. B. Pierce, in an unguarded moment, thoroughly exposed this transparent pose (Rec., 2100-1):

"Bodeker and his detective agency were employed in this case about March 5th., when we were in Birmingham taking the defendants' testimony. Mr. Bodeker was in the room during the taking of defendants' testimony, and that is the time when he was employed. *** Bodeker was employed in this case to help locate the former employes in Birmingham of the Celery-Cola Co. between the years 1901 and 1910. *** I couldn't tell you how long C. J. Pogue *was assisting Mr. Bodeker.* *** I do not know how much C. J. Pogue was paid for services in this case on behalf of the Coca-Cola Co. *** I don't know how many times Bodeker had seen Pogue before he was examined in this case. I don't know what information Pogue gave Bodeker other than the statement he made to him. Bodeker secured a statement from Pogue before the latter went on

> the stand. Just what that statement was I don't know. *** I understand that statement was given sometime between March and June."

Thus it is seen that, while Pogue was pretending to be assisting defendants in locating the former employes of Mayfield's various Birmingham companies, he was working for the Coca-Cola Co.,—playing a double game, and, instead of honestly trying to locate these former employes for defendants, he was apparently doing his best to keep defendants from finding them, and at the same time corralling them for plaintiff. This may account for the difficulty defendants had in rounding up Mayfield's former employes, and the facility with which plaintiff got hold of them.

If Pogue had really been acting in the interest of defendants instead of plaintiff, he would have informed Mayfield that he had all the old letters and files which he later produced at the time defendants were taking their testimony, because he knew defendants were moving heaven and earth to find some of their old "Koke" labels, letter-heads, price-lists, advertisements, etc.

J. C. MAYFIELD (Rec., 2450):

> "Pogue did not mention to me, nor did he intimate to anyone in my presence, that he had these letters which he has produced, or any documents of any kind or character referring to the 'Koke' business, or the 'Celery-Cola' business, or any business in which I was engaged."

But he must have told the Coca-Cola people that he had them, and that possibly explains why it was that defendants could not produce any of these papers, while plaintiff had no difficulty in doing so.

Another instance, showing what kind of a witness Pogue is, is this (Rec., 1857):

> "I was in Birmingham at the time of the trial of the case of *The State v. Melville Rice.* *** I know a colored fellow I always called 'Dick', whose name I have been told is James Dixon. I understood that he was arrested about the time of the trial of the case of *The State v. Melville Rice.* I found him in jail, and I suppose he was arrested. You ask if, as a matter of fact, I found at his house certain material that came from the Celery-Cola, or the J. C. Mayfield Mfg. Co.; I think Mr. Bodeker found some things in his house which I identified as the property of this company. You ask if I placed those things in his ho ne; well, I object, I refuse to answer that question. I refuse to answer it on the ground,—I refuse to answer it on the ground of *incriminating myself.*"

In plaintiff's brief are quoted extracts from Mayfield's testimony in the Rice case to the effect that the first formula he wrote was the "Celery-Cola" formula, which was eighteen years ago. Mayfield was asked concerning this statement, and replied (Rec., 2427):

> "You ask what the facts are with reference to the formula for Celery-Cola and the formula for Koke, —which was the first formula; Koke was the first formula. In response to the question asked me in the Rice Record, if the Celery-Cola formula was the first one that *I* made, I replied thereto, 'Yes, sir,' because the Celery-Cola formula was the first formula that Dr. Pemberton and I made,—later that I really felt that I made myself. Now I believe I can claim that I made the Celery-Cola formula myself. *I do not claim to have made the Koke formula.* I had absolutely nothing to do with that. Dr. Pemberton made that, that is what I bought out."

On pages 178-183 of plaintiff's schedules appear reproductions of some letters, and the inference is attempted to be drawn,—for what purpose is not apparent, —that "Celery-Cola" at that time had nux vomica, or strychnine, in it. Mr. Mayfield testifies concerning these letters on pages 2440-6 of the record, and completely removes any foundation for the inferences sought to be drawn.

Whatever idea the attorney Johnson may have had in writing his letter (Exhibit 13) can hardly be wished off on Mayfield and the latter held responsible for it. The letter is a privileged communication and should not have been introduced into the record.

APPENDIX No. 1.

2—390.

UNITED STATES OF AMERICA,

DEPARTMENT OF THE INTERIOR,

UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of Paper 59, filed January 26, 1915; Paper 104, filed June 26, 1916 and Paper 114, filed September 20, 1917, in the matter of

Opposition Number 1424,

The Coca-Cola Company

vs.

Koke Company,

Trade-Mark for Refreshing Non-alcoholic Beverage not in the nature of a food and a soda fountain syrup.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at Washington, in the District of Columbia, this 21st day of February, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal] M. H. COULSTON,
Acting Commissioner of Patents.

Opp. 1424—59

IN THE UNITED STATES PATENT OFFICE,

TRADE MARK OPPOSITION NO. 1,424.

—oOo—

COCA-COLA COMPANY)
) Before the
vs.) Examiner of
) Interferences.
KOKE COMPANY OF AMERICA.)

ANSWER OF KOKE COMPANY OF AMERICA TO THE AMENDED NOTICE OF OPPOSITION.

The Applicant and defendant, the Koke Company of America, for answer to the amended notice of opposition heretofore filed in this cause, says:

I.

The alleged cause of action, or the ground of opposition, set up in paragraphs 2, 3 and 4 of the amendments to the original notice of opposition, is a new, distinct and independent one, not germane to, or embraced within the scope of the allegations of, the original notice of opposition. And this alleged ground for opposing the registration of applicant's mark was not filed in the Patent Office within thirty days after the publication of Applicant's mark in the Official Gazette, as required by Section 6 of the Trade-mark Act of February 20, 1905, (Chapter 592, 33 Stat. L., 726.)

Service accepted this 26th day of January, 1915.

Francis M. Phelps,
Attorney for Coca-Cola Co.

II.

The notice of opposition as amended does not present any issue of trade-mark infringement, or state any cause of action over the subject-matter of which the Patent Office has jurisdiction, nor does it state any valid ground for refusing to register Applicant's mark, or any valid objection to the registration of the same; and it does not allege that Applicant's mark is identical with any registered or known trade-mark, owned and in use by another, and appropriate to the merchandise of the same descriptive properties, nor does it allege that Applicant's mark so nearly resembles any registered or known trade-mark, owned and in use by another, and appropriated by merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers; nor does it allege that Opposer will be "damaged" by the registration of Applicant's mark, within the meaning of the word "damaged," as used in Section 6 of the Trade-mark Act aforesaid.

III.

For further answer, the Applicant denies that the word "Koke" was a recognized and commonly and familiarly used nick-name for Opposer's product, "Coca-Cola," prior to the adoption and use of that word as a trade-mark for its product by the Koke Company of America, and its predecessors in title. On the other hand, the predecessors in title of the Koke Company of America adopted said word as a trade-mark for their product about April 1, 1888, and at a time when Opposer's product was practically unknown even under the formal name of "Coca-Cola," much less under any nick-

names. The purpose which Applicant's predecessors had in adopting the word "Koke" was to give their product a distinctive name by which it could be distinguished from all other similar products. Said name "Koke" at the time it was adopted and first used by Applicant's predecessors in title, did in fact identify and distinguish Applicant's product, and meant it and nothing else, and has continuously to the present time identified and distinguished Applicant's product and does now identify and distinguish it. Neither Opposer, nor any of its predecessors, or alleged predecessors, in title, ever at any time used or employed the word "Koke" in any manner whatever, either as a trade mark or trade-name for Opposer's product, or in any of its advertising, or in any manner whatever in connection with Opposer's product. And neither Opposer nor any of its predecessors, or alleged predecessors, in title ever at any time applied the said name to Opposer's product, nor did they ever authorize or recognize the use of said name by any one in connection with their said product; but, on the other hand, Opposer has constantly repudiated said name, and had repudiated it long before the filing of the original notice of opposition in this cause, and continues now to repudiate and to warn the public, by extensive advertising and otherwise, that the only name Opposer claims for its product, and the only name it authorizes to be used in connection with its product, or recognizes as a designation of the same, is the name "Coca-Cola." Applicant is advised and charges that even if Opposer had ever used said name in connection with its product, or had ever had the right to use said name in that connection, that right would have been lost and abandoned by Opposer's action in repudiating any and all names for its product except the name "Coca-Cola," and advising the public of such repudiation. Ap-

plicant is advised and charges that, even if Opposer had ever had any right to object to the registration of Applicant's mark "Koke" on the ground that the word "Koke" is a name, or nick-name, by which Opposer's product is known to the trade and public, Opposer is now estopped by its action in repudiating said name to make any such objection.

IV.

Applicant denies that the name "Koke" is an abbreviation of the name of "Coca-Cola," and denies that the form in which the word "Koke" is printed by Applicant is in designed and deliberate imitation of the manner in which Opposer prints its alleged trade-mark name, "Coca-Cola". Applicant denies that its product has in the past and is now being sold, dispensed and passed off on the public as and for Opposer's product. Applicant denies that the use by it of its trade-mark name, "Koke", as a name or designation for its product, is calculated to deceive the public, or now deceives the public into the belief that Applicant's product is the product of Opposer, and Applicant denies that its use of the name "Koke" to designate its product, has enabled Applicant's product to be passed off as and for Opposer's product. Applicant denies that Opposer's labels or the color of Opposer's barrels, or the color of Opposer's product is, or ever were distinctive or characteristic of Opposer's product. On the other hand, Opposer's labels and the color of its barrels, and of the product, is, and are common to the trade, and have been since before Opposer's product was invented.

V.

Applicant further answering says that the Opposer

comes into Court with unclean hands, and should be repelled and denied any relief, because of its own vicious unfair competition with Applicant. Applicant is advised and believes, and accordingly charges and states the fact to be that Opposer has now, and for some time past has had a large force of detectives, "investigators," law agents and other agents, and that this force has been for some time past, and is now kept constantly in the field and on the road for the purpose of driving Applicant from the field of competition, destroying Applicant's business and establishing a monopoly. These detectives and agents, under the authority and by the direction of Opposer, constantly maintain a despicable system of espionage over Applicant and its customers, whereby they and the soft drink trade generally are constantly shadowed and kept under surveillance, and their innermost business secrets and affairs are deliberately and stealthily pried into. By these means Opposer acquires, and has acquired a knowledge of the conditions and affairs of the Applicant, the names of its customers, the extent of its business and its resources, and Opposer has since then used, and is now using this information unfairly in an attempt to crush Applicant. Opposer, through its said corps of detectives and agents, and through its said system of espionage, keeps constantly informed of its competitors' customers, including the customers of Applicant, the beverages they are handling and the manufacturers from whom they purchase said beverages. Opposer's said agents and detectives, acting under its authority, and by its direction, go to Applicant's customers and slander Applicant's business, falsely representing to them that the Applicant's business is dishonest and fraudulent; and that Applicant's product, "Koke", is a dishonest and fraudulent product, and a substitute for Coca-Cola, and was

designed only to be sold as and for Coca-Cola, and that if the customers persist in handling Applicant's product they will be themselves engaging in a dishonest business and practicing a fraud upon the public; that no one has a right to manufacture and sell a drink similar in color, taste and constituency to Coca-Cola, except Opposer and those acting by and under its authority, and that any one handling any other similar drink, especially Applicant's product, renders himself amenable to prosecution. And these agents and detectives have threatened Applicant's dealers and customers with prosecution for trade-mark infringement and unfair competition if they continue to handle Applicant's product, and have told Applicant's customers that Opposer has set aside an enormous sum of money for the purpose of prosecuting those who handle Applicant's product, and that in the end the dealers and customers will be forced to give in and handle Opposer's product exclusively, or be financially ruined. And Opposer's said agents have informed the trade, and especially Applicant's customers ,of its said system of espionage, and have told them if they handle any other drink in competition with Coca-Cola, their detectives would soon find it out and Opposer would visit them with prosecutions in the courts, or else decline longer to sell them Coca-Cola and thus destroy such trade as they may have had with customers who happen to desire Opposer's product in preference to other similar products. They have also threatened to discontinue their advertising on the walls of buildings owned or leased by customers, and thus cut off their revenue from these advertisements, if they did not quit handling Applicant's product and sign an agreement to handle no other similar drink in competition with Opposer's product. And Opposer has sent its attorneys living in the same towns where Applicant's customers live to those

customers to officially advise them as a matter of law that if they persist in handling Applicant's product they will be subject to suit at the hands of Opposer, and said attorneys have so advised Applicant's customers, and endeavored to scare them into not handling Applicant's product in the future, and to intimidate them into signing a contract to handle Opposer's product exclusively. Said attorneys have threatened to bring suit against Applicant's customers if they did not comply immediately with Opposer's demands, and to further intimidate them have told them that Opposer's corps of detectives had a mass of convincing evidence proving conclusively that said customers' clerks had been substituting Applicant's product as and for Opposer's, etc. When Applicant's customers refused to be coerced or intimidated by any of these means, Opposer has filed suit against them in the Federal Courts for unfair competition and trademark infringement. A number of these suits have been filed against Applicant's dealers in different parts of the country, not in good faith, but simply and solely for the effect they will have upon the trade and to further intimidate and coerce Applicant's customers. Although one of these suits has been tried out on its merits, and Opposer's suit promptly dismissed, Opposer still continues to prosecute other customers of Applicant. By these and diverse other means Opposer, acting through its said corps of detectives and agents, has threatened, intimidated, coerced and brow-beaten customers of Applicant into signing a contract with Opposer agreeing not to handle any other drink in competition with Opposer's product, and to quit handling Applicant's product, and by these unfair and vicious means Opposer has damaged Applicant's business and destroyed a large part of its trade.

'Opposer had also stationed its agents in front of soda-

fountains which were known to be handling Applicant's product, and these agents, acting under the authority and by the direction of Opposer, have told the consuming public entering these establishments that Coca-Cola was not on sale there, but that Applicant's product "Koke" was, and that Applicant's said product was a vile substitute for Opposer's product, and a cheap imitation thereof, and warned them not to drink it. Time and again when Opposer's agents have failed in their efforts to destroy Applicant's trade by means of threats, intimidations, coersion, etc., they have deliberately picked fights with Applicant's customers and then beaten them up with their fists, in retaliation for their refusal to quit handling Applicant's goods and for their refusal to sign a contract to handle Opposer's product exclusively.

In order to further embarrass Applicant, and as another means of destroying Applicant's business, Opposer has brought suits against Applicant and its selling agencies in the United States District Courts at New Orleans, Dallas, St. Louis and Phoenix, Ariz., alleging as the cause of action in each case unfair competition and trademark infringement. All of said defendant corporations, the Applicant and its said selling agencies, are corporations chartered only under the laws of the State of Arizona, so that Opposer could have sued them all in one court and, if successful, gotten ample relief. But in order to string out its litigation, and harrass and annoy Applicant, and cripple it financially, Opposer brought the other suits in the other jurisdictions, widely separated as they are throughout different parts of the country.

As a result of all these tactics, and as a result of Opposer's system of espionage, the trade has been harrassed and annoyed and terrorized by Opposer to such an extent that a great many of Applicant's dealers have finally

decided to quit handling Applicant's product and to handle Opposer's exclusively as the easiest way to avoid any further such treatment, and other dealers are afraid to handle Applicant's product for fear of being subjected to similar treatment. All of these facts have come to the knowledge of Applicant only since the filing of its answer to the original notice of opposition in this cause.

Applicant denies each and every other allegation in said amended notice of opposition not hereinbefore expressly admitted, denied or explained, and now, having fully answered, prays to be hence dismissed.

KOKE COMPANY OF AMERICA
By F. T. F. Johnson,
Attorney for Koke Company of America.

.....

.....

Littleton, Littleton & Littleton,
Attys. for Applicant.

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF TENNESSEE,

SOUTHERN DIVISION.

STATE OF TENNESSEE,)
)
County of Hamilton.)

J. C. Mayfield, being duly sworn, deposes and says that he is the President of The Koke Company of America, the applicant and defendant herein. That he has read the above and foregoing answer of said corporation, and knows the contents thereof, and that the same is true of his own knowledge, except as to the

matters therein stated to be upon information and belief ,and as to those matters he believes it to be true, and he hereto affixes the seal of said corporation as the President thereof, having first been thereunto lawfully authorized, in further attestation of the truth of this its answer.

THE KOKE COMPANY OF AMERICA,
By J. C. Mayfield,
President.

Sworn to and subscribed before
me, this 23d day of January,
A. D. 1915. [Seal]

Chas. W. Lusk,
Notary Public, Hamilton County,
Tennessee.

DOCKET CLERK
JUN 26 1916

IN THE UNITED STATES PATENT OFFICE.

——oOo——

Opposition No. 1424.

——oOo——

THE COCA-COLA COMPANY, :
Opposer, :
: Before the
-vs- : Examiner of
: Interferences.
KOKE COMPANY OF AMERICA, :
Applicant. :

APEAL.

The applicant, the Koke Company of America, by its

attorneys, hereby appeals to the Commissioner of Patents in person from the decision of the Examiner of Interferences rendered in the above entitled opposition on May 24th, 1916, sustaining the opposition of the Coca-Cola Company, the opposer herein, and adjudging that the applicant, the Koke Company of America, is not entitled to the registration of its trade-mark "Koke" for which it has made application, and pays herewith the appeal fee of fifteen dollars ($15.00).

The following are assigned as reasons of appeal:

ASSIGNMENT OF ERRORS.

—I—

That the Examiner of Interferences erred,

(a) in holding in effect that the amended notice of opposition herein could be sustained notwithstanding the failure of the opposer to allege therein any of the grounds for refusing the registration of a trade-mark recited in Section 5 of the Trade-mark Act of 1905 as amended, and,

(b) in not dismissing the said notice of opposition because of its failure of the notice of opposition to contain any such allegation therein.

—II—

The Examiner of Interferences erred in sustaining said opposition, and in declining to dismiss the same, because the amended notice of opposition, upon which said opposition proceeding is based, does not present any valid ground for refusing the registration of applicant's mark, because it opposes the registration of applicant's said mark solely on account of the nature of said mark, and fails to allege that said mark,—

(A) (1) is not one by which the goods of its owner may be distinguished from other goods of the same class;

(2) consists of or comprises immoral or scandalous matter;

(3) consists of or comprises the flag, or coat of arms, or other insignia of the United States, or any simulation thereof, or of any state, or municipality, or of any foreign nation, or of any design or picture that has been, or may hereafter be, adopted by any fraternal society as its emblem, or any of the other public, or semi-public, insignia mentioned in subsection (b) of Section 5 of the Trade-mark Act of February 20th., 1905, as amended;

(4) is identical with a registered or known trade-mark, owned and in use by another, and appropriated to merchandise of the same descriptive properties, or so nearly resembles a registered or known trade-mark, owned and in use by another and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers;

(5) consists merely in the name of an individual, firm, corporation or association, not printed, impressed or woven in some particular or distinctive manner, or in association with a portrait of the individual; or merely in words or devices which are descriptive of the goods with which it is used, or of the character or quality of such goods; or merely a geographical name or term;

(6) consists of or comprises the portrait of a living individual;

(7) was not in the actual and exclusive use as a trade-mark of the applicant's predecessors from whom it derived title for ten years next preceding the passage of the Trade-mark Act of February 20th., 1905; or

(B) that opposer would be damaged by the registration of said mark, or any state of facts from which it can

be inferred that opposer would be damaged by its registration.

—III—

That the Examiner of Interferences erred in holding that the assignments of the Murfreesboro Bottling Works and William L. Bitting, did not transfer to the applicant the trade-mark rights therein referred to.

—IV—

The Examiner of Interferences erred in sustaining said opposition, and in declining to dismiss the same, because the notice of opposition upon which said opposition is based, which is an amendment of the notice of opposition originally filed, states a new, distinct and independent ground of complaint, if it states any at all, different from, and not germane to, or embraced within the scope of, that set up in the original pleading in this: that the original notice alleged as the sole ground of opposition that applicant's mark so nearly resembled, in sound, appearance and suggestion, the registered trade-mark, "Coca-Cola", owned and in use by opposer, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, whereas the sole alleged ground of opposition alleged in the amended notice is that applicant's mark consists of a nick-name and abbreviation used by the public as a means of asking for opposer's product, but which opposer has never used or employed at any time, in any manner, for any purpose; and, therefore, the alleged ground of opposition presented thereby, if ground of opposition it is, is barred because not filed in the Patent Office within thirty days after the publication of ap-

plicant's mark in the Official Gazette, as required by Section 6 of the Trade-mark Act of February 20th., 1905, as amended.

—V—

The Examiner of Interferences erred in holding that the word "Koke" is a common abbreviation and familiar nick-name which has been adopted and used by the public as a means of distinguishing opposer's goods from other goods of the same descriptive properties, and in holding that counsel for applicant did not contend that it has not been so used, because the greater weight of the evidence is against such holding, and because counsel for applicant did contend, and now contends, that said word has not been so used.

—VI—

The Examiner of Interfernces erred in holding that the adoption and use by the public of an abbreviation, nick-name or slang expression as a flippant means of indicating or suggesting that they desire the goods of a particular manufacture, or as a means of asking for or distinguishing the goods of a particular manufacture from other goods of the same descriptive properties, is a sufficient ground for refusing to register a mark consisting of such abbreviation, nick-name or slang expression as the trade-mark of one who had adopted and used it as a trade-mark prior to making application for the registration, because such a state of facts does not present a valid ground of opposition under the Trade-mark Act.

—VII—

The Examiner of Interferences erred in holding that applicant would not be entitled to register its mark if it failed to establish a use of that mark by it as a trade-mark for its goods prior to 1909, because of an alleged earlier use by the public of the same word, or of a word having the same sound, as a nick-name or abbreviation in asking for opposer's goods, for such use of said word by the public in such manner and for such purpose, in the absence of any use of it at any time, in any manner, for any purpose by opposer, does not constitute a valid ground for refusing to register a trade-mark under the Trade-Mark Act.

—VIII—

The Examiner of Interferences erred in holding that the decision of this case depends solely upon an alleged conflicting use of the mark "Coca-Cola" and the mark "Koke" in connection with the manufacture and sale of the products of the applicant and of the opposer, and in holding that there is any issue involved in this case with respect to the question as to whether or not applicant's mark "Koke" infringes opposer's mark "Coca-Cola".

—IX—

If the Examiner of Interferences was correct in holding that the decision of this case depends solely upon an alleged conflicting use of the marks "Koke" and "Coca-Cola" in connection with the sale of applicant's and opposer's products, then he erred in not dimissing the opposition and granting the registration prayed for by the applicant, because applicant's mark "Koke" does not in-

fringe opposer's said mark "Coca-Cola", and the Examiner of Interferences so held.

—X—

The Examiner of Interferences erred in holding that opposer had established a continuous chain of title, and continuous use, of the mark "Coca-Cola" from 1887 to the present time, and in concluding that this proposition was conceded by applicant, and in so regarding it, because the testimony of neither party warrants such conclusion, and because applicant, both in its brief and in the arguments of its attorneys at bar, argued against such conclusion.

—XI—

The Examiner of Interferences erred in holding that applicant's mark "Koke" is a generic term or name, within the meaning of the trade-mark Act, and in refusing to register it upon that ground, because it is not the name of any individual, firm, corporation or association, and it is not a geographical name or term, and it is not descriptive of the goods with which it is used, or of the character or quality of such goods, within the meaning of said Act.

—XII—

The Examiner of Interferences erred in holding that J. C. Mayfield, applicant's predecessor in title, abandoned the use of the mark Koke as a trade-mark for applicant's product, sometime between 1903 and 1909, because there is no evidence to warrant such a finding, and because the greater weight of the evidence was against such finding.

—XIII—

The Examiner of Interferences erred in failing to hold that applicant had established a continuous chain of title to, and continuous use of, its trade-mark "Koke," from the date of its adoption in 1888 down to the present time, and that applicant is therefore the owner, and entitled to the exclusive use, of said mark as a trade-mark for its product, and entitled to register the same.

WHEREFORE applicant prays that said decision of the Examiner of Interferences may be reversed, the opposition dismissed, and applicant's mark admitted to registration, to the end that justice may be done. This the 21st. day of June, A. D., 1916.

KOKE COMPANY OF AMERICA
By A. B. Littleton
Attorney.

A. B. Littleton
F. T. F. Johnson, by A. B. L.
Attorneys for Koke Co. of America.

—oOo—

IN THE UNITED STATES PATENT OFFICE.

—oOo—

Before the Commissioner of Patents.

—oOo—

THE COCA-COLA COMPANY,
Opposer,
-vs-
KOKE COMPANY OF AMERICA,
Applicant.
Opposition No. 1424.

—oOo—

NOTICE OF APPEAL AND REQUEST FOR TRANSCRIPT.

—oOo—

And now comes the Koke Company of America, by A. B. Littleton and....., its attorneys, and gives notice to the Commissioner of Patents of its appeal to the Court of Appeals of the District of Columbia from the decision of the said Commissioner rendered on or about the fourteenth day of August, 1917, denying the application of the Koke Company of America in the above entitled case for the registration of its trade-mark "Koke," and assigns as its reasons of appeal the following:

—I—

The Commissioner of Patents erred:

(a) In sustaining the amended notice of opposition herein, because said notice of opposition does not state any of the grounds for refusing the registration of a trade-mark prescribed by Section 5 of the Trade-mark Act of February 20th., 1905, as amended; and

(b) In not dismissing said notice of opposition because of its failure to contain any such allegation therein.

—II—

The Commissioner of Patents erred in sustaining said opposition, and in not dismissing the same, because the amended notice of opposition upon which this proceeding is based does not present any valid ground for refusing the registration of applicant's mark, because it opposes the registration of applicant's said mark solely on account of the nature of said mark, and fails to allege (A) that said mark,—

(1) is not one by which the goods of its owner may be distinguished from other goods of the same class;

(2) consists of or comprises immoral or scandalous matter;

(3) consists of or comprises the flag, or coat of arms, or other insignia of the United States, or any simulation thereof, or of any state, or municipality, or of any foreign nation, or of any design or picture that has been, or may hereafter be, adopted by any fraternal society as its emblem, or any of the other public, or semi-public, insignia mentioned in subsection (b) of Section 5 of the Trade-mark Act of February 20th., 1905, as amended;

(4) is identical with a registered or known trade-mark, owned and in use by another, and appropriated to merchandise of the same descriptive properties, or so nearly resembles a registered or known

trade-mark, owned and in use by another and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers;

(5) consists merely in the name of an individual, firm, corporation or association, not printed, impressed or woven in some particular or distinctive manner, or in association with a portrait of the individual; or merely in words or devices which are descriptive of the goods with which it is used, or of the character or quality of such goods; or merely a geographical name or term;

(6) consists of or comprises the portrait of a living individual;

(7) was not in the actual and exclusive use as a trade-mark of the applicant's predecessors from whom it derived title for ten years next preceding the passage of the Trade-mark Act of February 20th., 1905; or

(B) That opposer would be damaged by the registration of said mark, or any state of facts from which it can be inferred that opposer would be damaged by its registration.

—III—

The Commissioner of Patents erred in sustaining said opposition, and in not dismissing the same, because the notice of opposition upon which this opposition proceeding is based, which is an amendment of, or substitution for, the notice of opposition originally filed, states a new, distinct and independent ground of complaint, if it states any at all, different from, and not germane to, or embraced within the scope of, that set forth in the original pleading, in this: That the original notice alleged as the sole ground of opposition that applicant's mark "Koke"

so nearly resembled, in sound, appearance and suggestion, the registered trade-mark "Coca-Cola," owned and in use by opposer, and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers, whereas the sole alleged ground of opposition contained in the amended notice is that applicant's said mark "Koke" consists of a nick-name and abbreviation used by the public as a means of asking orally for opposer's product, but which opposer has never used or employed at any time, in any manner, for any purpose; and, therefore, the alleged ground of opposition presented thereby, if ground of opposition it is, is barred because said notice of opposition containing said alleged ground of opposition was not filed in the Patent Office within thirty days after the publication of applicant's mark in the Official Gazette, as required by Section 6 of the Trade-mark Act of February 20th., 1905, as amended.

—IV—

The Commissioner of Patents erred in holding that the purport of the original and amended notice of opposition is broadly the same and set forth in effect the same grounds of opposition, and in not dismissing the amended notice of opposition, because, while the respective parties were the same in each instance, and both pleadings sought to accomplish the same object, namely, to prevent the registration of applicant's mark "Koke," yet the alleged grounds advanced for refusing the registration of applicant's said mark in the amended pleading were entirely different from those advanced in the original pleading. In the original notice of opposition, the ground of opposition alleged was that applicant's

said mark "Koke" so nearly resembled opposer's registered trade-mark "Coca-Cola," owned and in use by opposer and appropriated to merchandise of the same descriptive properties, as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers,—that is to say, the ground of opposition was based upon the first proviso of sub-section (b) of Section 5 of the Trade-mark Act of February 20th., 1905, as amended; whereas in the amended notice of opposition, the alleged ground of opposition is, not that applicant's mark resembles opposer's mark "Coca-Cola," and not that applicant's mark falls within the condemnation of the first proviso of sub-section (b) of Section 5 of said Trade-mark Act, or within the condemnation of any of the provisions of said Act, but that it is a nickname, or term of derision, by which the public, of their own volition, and without being moved thereto in any way by opposer, have come to indicate, when making oral requests therefor, that they desire the article of opposer's manufacture as distinguished from the same article when made by others, and that while the use by applicant of its said mark "Koke" will not in any way infringe upon opposer's use of its said mark "Coca-Cola," yet applicant's use of its said mark will afford a color of justification for retail dealers to dispense applicant's product in response to verbal requests for "Koke," and thus opposer will be deprived of reaping the benefits of a monopoly of said word "Koke."

—V—

The Commissioner of Patents erred in holding that the use by the public of the nickname or slang expression "coke," as a flippant means of indicating or suggesting either that they desire the goods of a particular manu-

facture, or that they desire merely a certain kind or class of goods, in the absence of any use of said nickname or slang expression "coke" by opposer, or of the word "Koke," constitutes a sufficient ground for refusing to register the word "Koke" as a trade-mark of an applicant who had adopted and used it as a trade-mark for his goods prior to making application for the registration, because the Trade-mark Act of February 20th., 1905, as amended, not only does not authorize a refusal to register a mark upon any such ground, but expressly forbids such refusal upon any such ground.

—VI—

The Commissioner of Patents erred in holding that one has not the right to adopt as his trade-mark the popular psuedonym for the goods which he sells, and in refusing to register applicant's mark "Koke" on the ground that it is a popular psuedonym for the goods which applicant sells, because:

(a) The Trade-mark Act of February 20th., 1905, as amended, not only does not authorize, but expressly forbids, a refusal to register a mark upon any such ground;

(b) The greater weight of the evidence was against the conclusion that the word "Koke" is a popular peuedonym for the goods which applicant sells;

(c) A clear showing of continuous use of the mark "Koke" on the part of applicant and its predecessors in title, as a trade-mark for applicant's product, beginning before said word became common on the lips of the public, was made out by the greater weight of the evidence.

—VII—

The Commissioner of Patents erred in holding that applicant's mark "Koke," as used by applicant upon its

goods and packages, is a generic word or term, within the meaning of the Trade-mark Act of February 20th., 1905, as amended, and in refusing to register it on that ground, because it is not the name of any individual, firm, corporation or association, and it is not a geographical name or term, and it is not descriptive of the goods with which it is used, or of the character or quality of such goods, within the meaning of said Act.

—VIII—

The Commissioner of Patents erred in holding that applicant's mark "Koke" is not a mark by which the goods of the owner of the mark may be distinguished from other goods of the same class, within the meaning of the opening clause of Section 5 of the Trade-mark Act of February 20th., 1905, as amended, and in refusing to register it on that ground, because:

(a) Said action of the Commissioner was based upon an erroneous interpretation of the meaning of said clause. The Commissioner construed said clause to mean that a descriptive or generic word or term is not a mark by which the goods of the owner of the mark may be distinguished from other goods of the same class, within the meaning of said clause; whereas said clause, when properly construed, means just the opposite. It forbids a refusal to register any mark simply on account of the nature of such mark,—e. g., because it may be a descriptive or generic word or term,—provided it is of such a nature as to be in fact a *mark*, within the meaning of said Act, as distinguished from the substance, or any useful part or feature, of the article itself, or of the packages in which it is contained, or of the color, size, shape, etc., of the article itself, its packages, or labels.

(b) Said action of the Commissioner was based upon the assumption that applicant's mark "Koke" as used by applicant upon its goods and packages is a generic or descriptive word or term, within the meaning of said Act, when as a matter of fact it is not.

(c) Said action of the Commissioner was based upon the assumption that applicant, or those through whom it derived title, did not adopt or use said mark until after the word "coke" or "koke" had become common on the lips of the public as a nickname, slang term, or psuedonym for the goods which applicant sells, when, as a matter of fact, it was clearly established by the greater weight of the evidence that applicant's predecessors through whom it derived title adopted and used said mark as a trade-mark for said product long before the word "coke," or "koke," became common on the lips of the public, and that such use has been continuous ever since then down to the present time.

—IX—

The Commissioner of Patents erred in failing to find and hold that applicant had established a continuous chain of title to, and continuous use of, its said mark "Koke," as a trade-mark for its said product, from the date of the adoption of said mark by applicant's predecessors from whom it derived title, in 1888, down to the present time and that such use had been exclusive, and that applicant is therefore the owner, and entitled to the exclusive use, of said mark as a trade-mark for its product, and entitled to register the same as such.

—X—

The Commissioner of Patents erred in failing to find

and hold that opposer labels its goods and packages with a name that is deceptive and misleading, and which is used with the design of deceiving the public in the purchase of merchandise, within the meaning of Section 21 of the Trade-mark Act of February 20th., 1905, as amended, and in refusing to dismiss the opposition on that ground, because said fact was established by the greater weight of the evidence, and was not denied.

KOKE COMPANY OF AMERICA,
By A. B. Littleton
F. T. F. Johnson
ITS ATTORNEYS.

APPENDIX No. 2.

COPY OF INDEX TO PRINTED RECORD OF KOKE COMPANY OF AMERICA IN OPPOSITION No. 1424.

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APPENDIX No. 3.

2—390.

UNITED STATES OF AMERICA,

DEPARTMENT OF THE INTERIOR,

UNITED STATES PATENT OFFICE,

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of Papers 115 and 116, in the matter of

Opposition Number 1424,

The Coca-Cola Company
vs.
Koke Company,

Trade-Mark for Refreshing Non-alcoholic Beverage not in the nature of a food and a soda fountain syrup.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at Washington, in the District of Columbia, this 5th day of March, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal] R. F. WHITEHEAD,
Acting Commissioner of Patents.

Court of Appeals of the District of Columbia,

No. 1151, Patent Appeal Docket, October Term, 1917.

The Koke Company of America,
Appellant,
vs.
The Coca Cola Company.

Subject Matter: Trademark for refreshing non-alcoholic beverage not in the nature of a food and a soda fountain syrup. Opposition No. 1424.

Appeal from the Commissioner of Patents.

It appearing to the Court that the time within which the parties are required to deposit the amount for printing the record in this cause having elapsed, and they having failed to deposit the same,

It is therefore, In pursuance of the 19th rule of this Court, now here ordered and adjudged by this Court that this appeal be, and the same is hereby dismissed.

per Mr. Chief Justice Smyth,
January 5, 1918.

A true Copy
Test:
Henry W. Hodges
Clerk of the Court of Appeals
of the District of Columbia

[Seal]

2—603

Address Only
The Commissioner of Patents
Washington, D. C.

Letter No. 116.

EEG

DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

WASHINGTON

January 26, 1918.

In the matter of the Opposition of The Coca-Cola Company v. Koke Company of America Opposition No. 1424	))))))	On Appeal to the Court of Appeals of the District of Columbia. Docket No. 1151.

Sirs:

You are hereby informed that the above appeal from the decision of the Commissioner of Patents has been dismissed by the Court.

By direction of the Commissioner:

Very respectfully,

Chief Clerk.

F.

The Coca-Cola Co.,
Care F. L. Brown & Francis M. Phelps,
Washington, D. C.

Koke Co. of America
Care F. T. F. Johnson
McGill Bldg.
Washington, D. C.

APPENDIX No. 4.

CIRCUIT COURT OF THE UNITED STATES

DISTRICT OF MASSACHUSETTS.

SETH A. FOWLE, et al.,)
)
v.) In Equity No. 417.
)
MINER'S FRUIT NECTAR CO.)

OPINION

July 21, 1909.

BROWN J. This case is before the Court on final hearing upon bill, answer and proofs.

The complainants claim an exclusive right, as licensees of the Coca-Cola Company of Georgia, to sell in the New England states and some British provinces, a syrup known as "Coca-Cola", intended for use with carbonated water as a beverage. The defendant corporation is a manufacturer of beverages and syrups, and manufactures and sells a syrup called "Miner's Citro-Cola", and also an extract called "Miner's Citro-Cola Extract".

It is charged by the complainants that their rights in the trade name "Coca-Cola" are infringed by the use of the name "Citro-Cola", and it is also charged that the defendant has been guilty of unfair competition and has passed off its goods as and for the goods of the complainants. There is evidence from both complainants and respondents to the effect that the term "cola" has been commonly used in a two-word descriptive name for beverages to indicate the presence of cola nuts as an ingredient. There is testimony as to the use of the follow-

ing words: Pepsi-Cola, Pensi-Cola, Star-Cola, Afri-Cola, Lime Juice and Cola, Frugo-Cola, Vani-Cola, Cola Syrup, Hecks-Cola, Kola-Ade, Wine-Kola, New-Cola, Lon-Cola, Celery-Cola, Phos.Cola, Laxa-Cola.

Upon the proofs presented I am of the opinion that the complainant has failed to show that by the use of the word "cola" in combination with other descriptive terms there is any violation of complainant's rights. The defendant appears to have a right to manufacture what the complainants term a "cola beverage", using the term in a broad way to indicate a beverage having "cola" as an ingredient.

Further, the name "Miner's Citro-Cola", as it appears upon the various kinds of defendant's advertising material in evidence, does not seem to be calculated to deceive, and in the absence of proof of any case of actual deception I am unable to find that the defendant has been guilty of unlawful imitation of complainants' trade name.

The defendant also contends that the words Coca-Cola are so far merely descriptive of ingredients that the name cannot be exclusively appropriated. It is unnecessary to decide this point; for even if it be assumed against the defendant I am of the opinion that there is no unlawful imitation.

The defendant is also charged with imitation of complainants' dispensing bottle, designed to be used at soda fountains and to be refilled by the dispenser with Coca-Cola syrup, which is usually sold in jugs or kegs.

It is true that the defendant's dispensing bottles are similar to complainants' in size and shape, and also in having a white label with a broad gold margin; but in respect to these features the evidence shows that the bottles are of a common type, in very general use at drug stores and soda fountains for beverage syrups of vari-

ous kinds, as well as for other liquids. Both the complainants and the defendant use red letters on a white ground, but the general appearance of the inscription in respect to the number of words and the form and arrangement of lettering hardly supports the charge of intended imitation. In fact one who was familiar with the Coca-Cola label, if he saw defendant's label, would probably be informed at once that the bottle contained a preparation different from Coca-Cola. As an instrument of intended deception a plain dispensing bottle of ordinary type would be much more effective than the defendant's bottle with its distinctive name and lettering. It is a fair argument that if the defendant had really intended unlawful substitution, aided by a dispensing bottle, it would have suggested the use of Coca-Cola bottles or of plain bottles, rather than have provided bottles with the distinctive inscription "Miner's Citro-Cola" in letters so different from complainants' peculiar lettering.

Giving due consideration to the argument as to the usual hasty observance by customers, and as to the general impression rather than particular features of resemblance or difference, I am not satisfied that defendant's bottle is adapted to deceive, or was intended to deceive, those who seek to buy the complainants' goods. The defendant contends that it adopted the white and gold label with red letters not only for Miner's Citro-Cola but for several other preparations, solely because of the special attractiveness of the combination of red, white and gold, and its appropriateness for use in drug stores and at soda fountains, and without a thought of using it for deception or imitation. This seems probable.

The complainants further charge fraudulent substitution of the defendant's syrup for the complainants'. The testimony is insufficient to prove this charge.

The evidence shows that the defendant has endeavored to promote the sale of Miner's Citro-Cola and to induce customers to purchase it for use. That the defendant has overstepped its right to compete with the complainants in the manufacture of what is known as a "cola beverage" is not satisfactorily proved.

It is an important consideration that the complainant has not charged the defendant with any attempt to imitate the taste or smell of Coca-Cola; and there is no evidence before the Court that there is even a close imitation of color.

The complainants' brief contains references to various sales of Coca-Cola in which it is charged that some other article than Coca-Cola was supplied. I have read the testimony as to each case, and am of the opinion that complainants have failed to prove in any single case by competent testimony that any of the syrup sold as and for Coca-Cola was not in fact the preparation manufactured by the Coca-oCla Company. The utmost that can be said is that the complainants have produced the testimony of persons who were of the opinion that what had been sold for Coca-Cola did not taste like Coca-Cola; but this in my opinion is too unreliable to overcome positive evidence that the article supplied was in fact Coca-Cola. The witness Loveland, a salesman for the complainants, testifies to finding in various places something which in his opinion was not Coca-Cola. There is no testimony that this came from the defendant save that Loveland states that certain persons informed him that they had procured the article from Miner's Fruit Nectar Company. The burden was upon the complainants to prove that the syrup was not Coca-Cola and that it had been sold by the defendant as Coca-Cola. On neither point is the evidence satisfactory or convincing.

The complainants have in their custody a considerable

quantity of syrup undoubtedly sold by the defendant as Coca-Cola, and which is alleged to be spurious. The defendant has proved by a preponderance of evidence that it was bought by the defendant for Coca-Cola, and was supplied to its customers as Coca-Cola. No analysis has been made, and nothing stronger than the opinion of interested witnesses is produced as to the character and genuineness of the syrup.

The defendant has produced its account of sales for the year 1907. This has been under investigation but does not appear to afford evidence in corroboration of the complainants' charges of fraudulent substitution.

Higgins, a former salesman of the defendant, testified to a conversation between him and one of the officers of the defendant company, but in terms too indefinite to serve as proof of a charge of intended fraud. That he was instructed to make attempts to supplant Coca-Cola appears; but he testifies that when he was given an order for Coca-Cola he sent it in for Coca-Cola.

The complainants also introduced evidence to the effect that the respondent had purchased from other dealers empty Coca-Cola kegs in considerable number; two in 1905, four in 1906 and forty-three in 1907; but these kegs were of ordinary character, not in themselves distinctive, and apparently adapted for general use.

Special stress is laid upon the following circular:

MINER'S

CITRO-COLA
(trade mark)

EXTRACT
(7 to 1)

For Making the Popular Drink of the Day at the Minimum of Cost, viz: $1.00 per Gallon.

Is Perfect in Flavor and Stimulating Results.
Will Please the Most Skeptical.

One pint added to 7 pints of *medium heavy simple syrup* makes a gal. Make syrup 12 lbs. to gal. The result will please your trade and bring them back for more. This Extract is not like the many poor ones that have been offered to the trade from time to time, but is perfect in COLOR, SMELL, TASTE AND IN EVERY RESPECT, "A WORD TO THE WISE".

Price $6.00 per Gallon, (Makes 8 Gallons.)

Sample gallon sent prepaid anywhere in the United States on receipt of price.

MINER'S FRUIT NECTAR CO.
makers of

Cream Puff, Cream-Aid, Van-Ol, Vanilo, Ext.
Cherry Phosphate, Orange-Mul, etc.

214 State St., Boston, Mass.

There are perhaps some suspicious expressions. To convert this circular into an attempt to procure an unlawful substitution of Citro-Cola for Coca-Cola requires, however, some imagination. Complainants urge that "the popular drink of the day at the minimum of cost" has express reference to Coca-Cola, for the reason that Coca-Cola was a very popular and well advertised drink, while Citro-Cola was a comparatively unknown drink. The words "perfect in color, smell, taste and in every respect, 'A word to the wise'," might be suggestive of imitation if it were not for the fact that no imitation in

these particulars is claimed. Can it be fairly said that the defendant has said in substance to the retailer, "Buy this extract and sell the product for Coca-Cola?" Or is it a fairer interpretation to say that the defendant has offered a lawful substitute or a competitor for Coca-Cola which will answer the purpose quite as well and be equally satisfactory to the customer, who would have no particular preference for Coca-Cola over any other sweetened and carbonated beverage of a generally similar character?

Upon the whole I am of the opinion that the complainants have failed to make out the allegations of their bill by such substantial proofs as are required to support the charge of deliberate and fraudulent substitution. In this view of the case it becomes unnecessary to consider other questions as to the sufficiency of the bill, or the peculiar aspect of the case which arises from the fact that the complainants are not manufacturers but only licensees of the manufacturers for a particular territory.

The defense of unclean hands based upon such representation as to ingredients as may be contained in the words "Coca" and "Cola" does not in my opinion require consideration, in view of the conclusion as to the insufficiency of the proof.

The bill will be dismissed.

****

ENDORSED.
417 Eq.

SETH A. FOWLE et al.
v.
MINERS FRUIT-NECTAR CO.

OPINION OF COURT
(BROWN, J.)

UNITED STATES CIRCUIT COURT
FILED IN CLERK'S OFFICE
JUL 21 1909
MASS. DIST.

DISTRICT COURT OF THE UNITED STATES
District of Massachusetts.

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, and now custodian of the records of the Circuit Court of the United States, District of Massachusetts, under Act of Congress designated as "The Judicial Code," (Chapter 13, Sec. 289) approved March 3, 1911, which took effect January 1, 1912, certify that the foregoing is a true copy of the Opinion of Court handed down July 21, 1909, in the cause in equity entitled,

No. 417,
SETH A. FOWLE, et al.,
Plaintiff,
v.
MINER'S FRUIT NECTAR COMPANY,
Defendant,

in said Circuit Court determined.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this sixteenth day of February, A. D. 1920.

[Seal] JAMES S. ALLEN,
Clerk.

DISTRICT COURT OF THE UNITED STATES
District of Massachusetts.

I, JAMES M. MORTON, JR., Judge of the District Court of the United States for the District of Massachusetts, do hereby certify that JAMES S. ALLEN, whose name is subscribed to the foregoing certificate of attestation is and was at the time of making the same the Clerk of said District Court in and for the District of Massachusetts, duly appointed and qualified the keeper of its seal and the custodian of its files and records, and that his official acts are entitled to full faith and credit; that I am well acquainted with the handwriting of said Clerk, and verily believe his signature to said certificate to be genuine, and that said certificate is in due form and by the proper officer.

Witness my hand at the City of Boston, in said District, this sixteenth day of February, A. D. 1920.

JAMES M. MORTON, JR.,
U. S. District Judge.

DISTRICT COURT OF THE UNITED STATES
District of Massachusetts.

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that Honorable JAMES M. MORTON, Jr., whose name is subscribed to the foregoing certificate of attestation, is and was at the time of making the same, Judge of said United States District Court for the District of Massachusetts, duly commissioned and qualified, and that his official acts are entitled to full faith and credit; that I am well acquainted with the handwriting of said Judge and verily believe his signature to said certificate to be genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Boston, in said District, this sixteenth day of February, A .D. 1920.

[Seal] JAMES S. ALLEN,
Clerk.

APPENDIX No. 5.

2—394

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come,
Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Certificate of Registration, Statement, Declaration and Drawing in the matter of the

Trade-Mark Registered by

Christo Mfg. Company,

April 29, 1913, Number 91,320,

for Certain Flavoring Extracts and Carbonated Syrups for Making Non-Alcoholic Beverages.

The certificate of registration was granted for the term of twenty years, and so far as is disclosed by the records of this office, said certificate is still in full force and effect.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at Washington, in the District of Columbia, this sixteenth day of February, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal] M. H. COULSTON,
Acting Commissioner of Patents.

2-375. No. 91320.

THE UNITED STATES OF AMERICA,
To all to whom these Presents shall come:

THIS IS TO CERTIFY that by the records of the UNITED STATES PATENT OFFICE it apears that CHRISTO MFG. COMPANY, of Richmond, Virginia, a corporation organized under the laws of the State of Virginia, did, on the 7th day of January, 1913, duly file in said Office an application for REGISTRATION of a certain

TRADE-MARK

for CERTAIN FLAVORING EXTRACTS AND CONCENTRATED SYRUPS FOR MAKING NON-ALCOHOLIC BEVERAGES, that it duly filed therewith a drawing of the said TRADE-MARK, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of its said TRADE-MARK under the law, the said TRADE-MARK has been duly REGISTERED to Christo Mfg. Company, its successors or assigns, in the UNITED STATES PATENT OFFICE, this twenty-ninth day of April, 1913.

This certificate shall remain in force for TWENTY YEARS, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

C. C. BILLINGS,
Acting Commissioner of Patents.

UNITED STATES PATENT OFFICE.

Christo Mfg. Company, of Richmond, Virginia.
Trade-Mark for Certain Flavoring Extracts and Concentrated Syrups for Making Non-Alcoholic Beverages.

91320. Registered Apr. 29, 1913.
Application filed January 7, 1913. Serial No. 67,763.

STATEMENT.

To all whom it may concern:

Be it known that the Christo Mfg. Company, a corporation duly organized under the laws of the State of Virginia, located at Richmond, in the County of Henrico and State of Virginia, and doing business at 124 Virginia street, in the said city of Richmond, has adopted and used the trade-mark shown in the accompanying drawing.

The trademark has been continuously used in the business of the said corporation and of its predecessors in business, Christian Brothers who secured registration No. 64132 since Jan. 1, 1907, the applicant corporation being the present owner of the said trade-mark, registration No. 64132.

The particular description of goods to which the trademark is appropriated is ginger ale, lime smash, orangeade, root beer, limeade, cherry, cola, flavoring extracts for non-alcoholic beverages, grape juice, lemon soda, and concentrated syrups for making nonalcoholic beverages, in Class 45, Beverages, nonalcoholic.

The trademark is usually applied to the receptacles containing the goods by placing thereon printed labels upon which the mark is shown.

CHRISTO MFG. COMPANY.
HAMPTON FLEMING,
Prest.

CHRISTO

DECLARATION.

State of Virginia: county of Henrico: ss.

Hampton Fleming being duly sworn, deposes and says he is president of the corporation, the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said corporation to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form, or in any such near resemblance thereto, as might be calculated to deceive; that the said trade-mark is used by the applicant in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered and that the specimens (or facsimiles) show the trade-mark as actually used upon the goods.

HAMPTON FLEMING.

Subscribed and sworn to before me, a notary public, this 12th day of August, 1912.

[L. S.] A. H. ALLEN,
Notary Public.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

2—394

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come,
Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Certificate of Registration, Statement, Declaration and Drawing in the matter of the

Trade-Mark Registered by

Leo A. Finn,

April 7, 1914, Number 96,119,

for Ginger-Ale, Sarsaparilla, Birch-Beer, Root-Beer, Lemon-Soda, Strawberry-Soda, and Cola.

The certificate of registration was granted for the term of twenty years, and so far as is disclosed by the records of this office, said certificate is still in full force and effect.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at Washington, in the District of Columbia, this sixteenth day of February, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal] M. H. COULSTON,
Acting Commissioner of Patents.

2-375. No. 96119.

THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come:

THIS IS TO CERTIFY that by the records of the UNITED STATES PATENT OFFICE it appears that LEO A. FINN, of Washington, District of Columbia, did, on the 31st day of December, 1913, duly file in said Office an application for REGISTRATION of a certain

TRADE-MARK

for GINGER-ALE, SARSAPARILLA, BIRCH-BEER, ROOT-BEER, LEMON-SODA, STRAWBERRY-SODA, AND COLA, that he duly filed therewith a drawing of the said TRADE-MARK, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of his said TRADE-MARK under the law, the said TRADE-MARK has been duly REGISTERED to Leo A. Finn, his heirs or assigns, in the UNITED STATES PATENT OFFICE, this seventh day of April, 1914.

This certificate shall remain in force for TWENY YEARS, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington, this seventh day of April, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States the one hundred and thirty-eighth.

[Seal]

J. T. NEWTON,
Acting Commissioner of Patents.

UNITED STATES PATENT OFFICE.

Leo A. Finn, of Washington, District of Columbia.

Trade-Mark for Ginger-Ale, Sarsaparilla, Birch-Beer, Root-Beer, Lemon-Soda, Strawberry-Soda, and Cola.

96,119. Registered Apr. 7, 1914.
Application filed December 31, 1913. Serial No. 74,911.

STATEMENT.

To all whom it may concern:

Be it known that I, Leo. A. Finn, a citizen of the United States ,residing at Washington, in the District of Columbia, United States of America, and doing business at Seventh and G streets northeast, in said city, under the firm-name of Standard Bottling Works, have adopted and used the trade-mark shown in the accompanying drawing.

The trade mark has been continuously used in the business of the applicant since December 1st, 1913.

The particular description of goods to which said trade-mark is appropriated is ginger-ale, sarsaparilla, birch-beer, root-beer, lemon-soda, strawberry-soda and cola in Class 45 Beverages, nonalcoholic. The trade-mark is usually applied to the receptacles containing the goods by means of printed labels upon which the trade-mark is shown.

LEO A FINN.

GRIDIRON CLUB

DECLARATION.

United States of America District of Columbia ss.

Leo A. Finn being duly sworn, deposes and says he is the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes himself to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form, or in any such near resemblance thereto, as might be calculated to deceive; that the said trade-mark is used by the applicant in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered and that the specimens (or facsimiles) show the trade-mark as actually used upon the goods.

LEO A FINN.

Subscribed and sworn to before me, a notary public, this 19th day of December, 1913.

[L. S.] ROBERT T. LANG,
Notary Public, D. C.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

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DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come,
Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Certificate of Registration, Statement, Declaration and Drawing in the matter of the

Trade-Mark Registered by

Brechet & Richter Company,

December 14, 1915, Number 107,599,

for Non-Alcohloc Carbonated Beverages and Certain Named Syrups Used in the Making of the Same.

The certificate of registration was granted for the term of twenty years, and so far as is disclosed by the records of this office, said certificate is still in full force and effect.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at Washington, in the District of Columbia, this sixteenth day of February, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal] M. H. COULSTON,
Acting Commissioner of Patents.

2-375. No. 107599.

THE UNITED STATES OF AMERICA,

To all to whom these Presents shall come:

THIS IS TO CERTIFY that by the records of the UNITED STATES PATENT OFFICE it appears that BRECHET & RICHTER COMPANY, of Minneapolis, Minnesota, a corporation organized under the laws of the State of Minnesota, did, on the 16th day of November, 1914, duly file in said Office an application for REGISTRATION of a certain Revenue Stamps 10 Cents

TRADE-MARK

for NON-ALCOHOLIC CARBONATED BEVERAGES AND CERTAIN NAMED SYRUPS USED IN THE MAKING OF THE SAME, that it duly filed therewith a drawing of the said TRADE-MARK, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of its said TRADE-MARK under the law, the said TRADE-MARK has been duly REGISTERED by Brechet & Richter Company, its successors or assigns, in the UNITED STATES PATENT OFFICE, this fourteenth day of December, 1915.

This certificate shall remain in force for TWENTY YEARS, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington, this fourteenth day of December, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and fortieth.

[Seal]

R. F. WHITEHEAD,
Acting Commissioner of Patents.

UNITED STATES PATENT OFFICE.

Brechet & Richter Company, of Minneapolis, Minnesota.

Trade-Mark for Non-Alcoholic Carbonated Beverages and Certain Named Syrups Used in the Making of the Same.

107,599. Registered Dec. 14, 1915.
Application filed November 16, 1914. Serial No. 82,610.

STATEMENT.

To all whom it may concern:

Be it known that the Brechet & Richter Company, a corporation duly organized under the laws of the State of Minnesota, and located in the city of Minneapolis, county of Hennepin, in said State, and doing business at No. 212 Fifth street north, in said city, has adopted for its use the trade-mark shown in the accompanying drawing, for non-alcoholic carbonated beverages and syrups used in the making of the same—namely, nectar compound, fruit syrups, apple-cider maker, non-alcoholic coffee liqueur, vegetable flavors, fruit extracts, cola extract, in Class 45, Beverages, non-alcoholic.

The trade-mark has been continuously used in the business of said corporation since about May, 1909.

The trade-mark is usually displayed on the packages containing the goods by printing, stamping or stenciling it thereon, or by placing thereon a printed label on which the trade-mark is shown.

BRECHET & RICHTER COMPANY,
By H. RICHTER,
Secretary.

B.& R.

DECLARATION.

State of Minnesota, county of Hennepin. ss.

Harry Richter, being duly sworn, deposes and says that he is secretary of said corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by the said corporation in commerce among the several States of the United States, and between the United States and foreign nations, that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

HARRY RICHTER.

Subscribed and sworn to before me, a notary public, this 10th day of November, 1914.

[L. S.] H. A. BOWMAN,
Notary Public.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."